

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

AND

JOINT APPENDIX

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

222

No. 19,739

Wilburt King, Appellant

v.

United States of America, Appellee

Appeal from judgment of the United States
District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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December 20, 1965

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JOINT APPENDIX

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**Appeal from judgment of the United States
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**Mary M. Burnett
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Counsel for Appellant

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STATEMENT OF QUESTIONS PRESENTED

1. Whether, when a narcotic offense is alleged to have been committed in the presence of a narcotic agent or officer - thus obviating the necessity for a police investigation to make a general inquiry into an unsolved crime due to the focus of police attention on a particular suspect - the deliberate delay of six (6) months on the part of the narcotics officers in filing formal charges against that suspect and causing an arrest warrant to be issued violated appellant's right to due process of law, a speedy trial and the assistance of counsel as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States.

2. Whether appellant has been denied due process of law, the right to a speedy trial and the assistance of counsel as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States, where his arrest was made within the time prescribed in the Federal statute of limitations governing the institution of criminal proceedings, but a prejudicial seven (7) months delay occurred between the time of filing the complaint and issuing the warrant and the actual accidental apprehension of the appellant, despite the fact that the narcotics officers knew, or should have known, where appellant resided and yet the officers

could produce no log or record of attempts to serve the arrest warrant in accordance with its "forthwith" command in order to substantiate the government's claim of diligence in attempting to serve the warrant.

3. Whether the culmination of the following factors in this case amounted to a denial of due process of law, the right to a speedy trial and assistance of counsel as guaranteed the appellant by the Fifth and Sixth Amendments of the Constitution of the United States: the sum total of the delays amounting to nearly fourteen (14) months delay between the date of the alleged commission of the offense and the actual indictment; failure of the police to make an immediate arrest; inability of the appellant to conduct a defense at the trial due to the lapse of time which had dimmed his memory respecting the date and time in question; thus prejudicing him and operating to the benefit of the government; failure of the government to produce a record or log of attempts to serve the arrest warrant "forthwith"; the conflicting testimony respecting the attempts to serve the warrant; the conflicting testimony respecting the identification of the appellant; and the fact that the government's sole witnesses at trial were two persons, the narcotic agent and the addict-informer, both having a direct interest in the outcome of the case.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,739

WILBURT KING,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court
For The District Of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Columbia, entered on September 10, 1965, (J.A.^{1/}3) convicting the appellant of violations of Section 4705(a) and 4704(a) of Title 26, United States Code, and of Section 174 of Title 21 United States Code, offenses involving a single sale of one glassine envelope of narcotics.

1/ "J.A." references are to the Joint Appendix accompanying brief.

The notice of appeal was filed on September 16, 1965, (J.A. 1) pursuant to Rule 37 of the Federal Rules of Criminal Procedure. This Honorable Court has jurisdiction under Title 28 United States Code Section 1291.

STATEMENT OF THE CASE

Appellant herein was indicted December 9, 1963, (J.A.13) some fourteen months after an alleged single transaction sale of one glassine envelope containing 140 milligrams of narcotics. The indictment was in three counts and charged that the sale occurred on September 29, 1962, within the District of Columbia, and was made to one Atria L. Harris (J.A.12(a)), an addict-informer (Tr. Vol. I, June 28, 1965, pages 24 and 37)^{2/} in the presence of Rufus Moore, a narcotic agent. (Tr. ibid., page 17) No arrest was made by the agent at the time of the alleged transaction. (Tr. ibid., page 54) However, about six (6) months thereafter, on March 15, 1963, a complaint was filed (J.A. 14) and a warrant issued in the same name as that of the appellant but containing no identifying address. (J.A. 15) The arrest was not made until some seven (7) months after the filing of the complaint and issuance of the arrest warrant, and some thirteen (13) months after the date of the alleged offense. (Tr. Vol. I June 24, 1965, page 56) The indictment was not handed down until two months later, December 9, 1963. (J.A.13)

^{2/} "Tr." references are to the transcript. The transcript comprises five volumes as follows: Preliminary Hearing, November 26, 1963; 1st Motion to Dismiss Indictment, Vol. 1, dated Feb. 14, 1964; 2nd Motion to Dismiss Indictment, Vol. I Thursday, June 24-25, 1965; Vol. II, June 25, 1965; and the trial, Vol. I, June 28, 1965.

It appears that no attempt was made to serve the arrest warrant on the appellant at his residence, 1407 "A" Street, S.E. Washington, D.C. (Tr. Vol I, June 24, 1965, pages 22 and 24; Vol. 1, Feb. 14, 1964, page 15) He was apprehended by an officer of the narcotic squad as he was coming out of the Municipal Center on C Street, N.W., Washington, D.C. in broad daylight during regular business hours on October 28, 1963. (Tr. Vol. 1, June 24, 1965, page 56; Vol. II, June 25, 1965, page 5) The government claimed that an earlier arrest was not made because the appellant could not be located. (Tr. Vol. 1, Feb. 14, 1964, page 11 and 13; Vol. I, June 24, 1965, page 57) But no log or record of attempts to serve the appellant with the arrest warrant was kept by the narcotics squad. (Tr. Vol. 1, June 24, 1965, pages 57 and 58.)

Originally, appellant was represented in this case by John A. Shorter, Esq. (J.A.2(a)) who filed a Motion to Dismiss the Indictment predicated on prejudicial delays in the initiation of the prosecution. (Tr. Vol. I, Feb. 14, 1964, page 2) The grounds for dismissal set forth in that motion were that the seven (7) months delay between the date the complaint was filed and the date the defendant was apprehended coming out of the Municipal Center was prejudicial to the defendant and a denial to him of his right to a speedy trial under the Sixth Amendment

of the Constitution of the United States as implemented by Rule 48(b) of the Federal Rules of Criminal Procedure. (J.A. 10(b)2) No due process argument was presented at that time. Following a hearing on the motion it was denied by the Court. (Tr. Vol 1, Feb. 14, 1965, page 17; J.A.9) The Court made no findings of fact but indicated that because the arrest was made within the period of time covered by the statute of limitations no speedy trial violation occurred (Tr. Vol. 1, Feb. 14, 1964, page 3) and in fact ruled that "delay in making an arrest after the complaint is filed is no ground for dismissing the indictment"; (Tr. ibid., page 4) indicating further that the statute of limitations in criminal actions would be a nullity if the speedy trial concept attached before an arrest was made. (Tr. Vol. 1, Feb. 14, 1964, pages 7 and 8)

Later in the proceedings of the case Attorney Shorter withdrew as counsel and Mary M. Burnett entered her appearance for the appellant. (J.A. 2(b)) Whereupon a second Motion to Dismiss the indictment accompanied by points and authorities was filed. (J.A.7(a)-7(d) and 8(a)-8(e)) The grounds of this motion were the denial of both Fifth and Sixth Amendment rights to the appellant, claiming lack of due process and speedy trial and lack of diligence on the government's part in not causing the arrest warrant to be served "forthwith" and indicating the difficulty

counsel was having in preparing for trial in that due to the passage of time the defendant could not recall anything about the date and time in question. (J.A.7(a)-7(d); Tr. Vol. I, June 24, 1965, page 9) As the grounds for the motion differed a second hearing was held at which time the defendant and other witnesses testified that he resided at 1407 A Street, S.E., Washington, D.C. during the time in question. (Tr. Vol. I June 24, 1965) Again the court denied the motion to dismiss the indictment and no findings were made. (Tr. Vol. II, June 25, 1965, page 13)

Subsequently, the appellant went to trial with only his "not guilty" plea as a defense, and was convicted of the offenses charged, (Tr. Vol. I, June 28, 1965, page 97-98) on the sole testimony of two government witnesses, the narcotic agent and the addict informer. (Tr. Vol. I, June 28, 1965, pages 12-43 and 43-56)

Judgment was entered against the defendant by the trial court on 10, 1965 (J.A.3) and a Motion for Acquittal or in the Alternative for a New Trial was denied by the Court on August 16, 1965. (J.A.4) The appeal herein was noted on September 16, 1965. (J.A.1)

STATUTES AND RULES INVOLVED

Title 18 United States Code Section 3282 (68 Stat. 1145 and 75 Stat. 648):

"Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

Title 26 United States Code Section 7607(70) Stat. 570):

"The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401(1) of the Tariff Act of 1930, as amended: 19 U.S.C., sec. 1401(1), may -

(1) carry firearms, execute and serve search warrants and arrest warrants, and serve subpoenas and summonses issued under the authority of the United States, and

(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

Federal Rules of Criminal Procedure Rule 4 (in pertinent part):

"(a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Form.

(1) Warrant. The warrant shall be signed by the commissioner and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available commissioner.

...

(c) Execution or Service; and Return.

(1) By whom. The warrant shall be executed by a marshal or by some other officer authorized by law. ...

(4) Return. The officer executing a warrant shall make return thereof to the commissioner or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be

returned to the commissioner by whom it was issued and shall be cancelled by him. ...At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not cancelled...may be delivered by the commissioner to the marshal or other authorized person for execution or service."

STATEMENT OF POINTS

1. The appellant's right to due process of law, a speedy trial, and assistance of counsel as guaranteed by the Fifth and Sixth Amendments of the Constitution of the United States has been violated as the narcotic offense allegedly took place in the presence of a narcotic agent - thus obviating the necessity for a police investigation to make a general inquiry into an unsolved crime due to the focus of police attention on him - yet the narcotics officers deliberately delayed for six (6) months filing a formal complaint or charge against him and causing an arrest warrant to be issued.

2. The appellant has been denied due process of law, the right to a speedy trial and the assistance of counsel as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States for while he was arrested within the time prescribed in the Federal statute of limitations governing the institution of criminal proceedings, a prejudicial delay of 7 months occurred between the date the complaint and warrant issued and his accidental apprehension, despite the fact that the narcotics officers knew, or should have known where he resided, and the officers could produce no log or record of attempts to serve the warrant on him "forthwith" in substantiation of the government's claim that diligent efforts had been made to serve the warrant.

3. The appellant has been denied his right to due process of law, a speedy trial, and assistance of counsel as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States in view of the culmination of the following factors in this case:

(1) the sum total of the delays encountered amounting to nearly fourteen (14) months delay between the date of the alleged commission of the offense and actual indictment;

(2) failure of the police to make an immediate arrest;

(3) inability of appellant's counsel to prepare and conduct a defense to the charges placed against him due to the lapse of time which caused appellant's memory to be dimmed as to the event and circumstances concerning the date and time in question with the result that he was prejudiced and the government benefited from the delay;

(4) failure of the government to produce a record or log of attempts to "forthwith" serve the appellant with the arrest warrant;

(5) the conflicting testimony of the narcotics agent respecting attempts to serve the warrant;

(6) the conflicting testimony of the narcotics agent respecting the identification of the appellant; and

(7) the fact that the government's sole witnesses at trial were two persons, the narcotic agent and the addict-informer, both having a direct interest in the outcome of the case.

SUMMARY OF ARGUMENT

It is the position of the appellant that the trial court should have granted the Motion to Dismiss the Indictment because the delays encountered between the time of the indictment, the arrest, the complaint and issuance of warrant, and the alleged commission of the offense have prejudiced his ability, through counsel, to properly defend himself at trial, and that accordingly he has been denied Fifth and Sixth Amendment Constitutional guarantees.

Further, these delays in and of themselves resulted in a denial to him of due process of law as guaranteed him by the Fifth Amendment, and his right to a speedy trial as impliedly guaranteed in that amendment and expressly set forth in the Sixth Amendment.

Appellant contends the government was without just reason for the delays and that in any event the statute of limitations has no applicability in a criminal proceeding where from the very moment the alleged crime has been committed the government has all the information necessary to make out a complete case; that while, in a factual pattern such as the instant one delays in bringing the defendant to a speedy trial can reach due process proportions, in any event the speedy trial concept attached the instant a formal charge or complaint was filed. From that

moment on it was incumbent upon the narcotics officers and agents to see that the appellant here charged was expeditiously brought to trial.

As for the arrest warrant itself, it must carry on its face the exact name and all known information respecting the location of the defendant, when such information is known or can easily be ascertained by the police at the time the warrant issued. That once issued, the warrant must be served in accordance with its "forthwith" command and a proper record or log must be kept of each official attempt to serve it. That if the warrant is not served within a reasonable time it loses its efficacy and becomes stale; hence, it must be reissued periodically with any new information substituted on its face until such time as it is cancelled or the person named in the warrant apprehended.

Finally, appellant argues that if no one factor in this case standing alone can be said to violate his right to due process of law, speedy trial and assistance of counsel as envisioned by the Fifth and Sixth Amendments, that all factors here present in toto amount to a denial to him of due process. Specifically, in culmination these factors are the prejudicial delay encountered, failure of police to make an immediate arrest, inability of counsel to adequately prepare his defense due to

lapse of time and loss of memory on his part concerning the date and time in question, the conflict in the testimony presented, and the fact that the government's two witnesses who testified at the trial both had a direct personal interest in the outcome of the case.

I

The appellant's right to due process of law, a speedy trial, and assistance of counsel as guaranteed by the Fifth and Sixth Amendments of the Constitution of the United States has been violated as this narcotic offense allegedly took place in the presence of a narcotic agent, thus obviating the necessity for a police investigation to make a general inquiry into an unsolved crime due to the focus of police attention on him, yet the narcotics officers deliberately delayed for six (6) months filing a formal complaint or charge against him and causing and arrest warrant to be issued.

Fifth and Sixth Amendment rights guaranteed appellant by the Constitution of the United States have here been violated. The government's purposeful delay of six (6) months in not making an immediate arrest or issuing a complaint and warrant for the arrest of the appellant for the narcotic violation alleged to have been committed in the presence of the narcotic officer completely ignores the due process of law concept embodied in the Fifth Amendment in that fundamental principles of liberty, justice and fair play have been utterly disregarded. Galvin v. Dress, 347 U.S. 522 (1954); Burns v. Lovell, 91 U.S.App.D.C. 208 (1952), 202 F.2d 335, aff'd 346 U.S. 137, rehearing denied 346 U.S. 844; U.S. ex rel Foley v. Ragen, 52 F.Supp. 265 (D.C.Ill. 1943).

Moreover, this delay placed a stumbling block in the avenue leading to the appellant's arriving at an intelligent and full understanding of the charges ultimately placed against him. Bergen v. U.S., 145 F.2d 181 (8th Cir. 1944). In effect the delay encountered stymied assistance of counsel envisioned by the

Sixth Amendment. Appellant was entitled to the guiding hand of counsel as soon as he came under the government's scrutiny so as to insure him against accumulating prejudice and the hampering of his defense. Wilfong v. Johnson, 156 F.2d 507 (9th Cir. 1946) From the instant the offense was allegedly committed the eyes of the government became focused on the appellant and the government's case was complete. Escobedo v. Illinois, 378 U.S. 478 (1964) At that moment all control of evidentiary means rested with the government and each day that passed improved a position already at its best. Nickens v. U.S., 116 U.S.App.D.C. 338, dissent 344 (1963); 323 F.2d 808, dissent 814.

The doctrine of fair play inherent in the Fifth Amendment does not permit the government to delay the arrest of one known to have violated the law; nor can the government lie in wait before pouncing, hoping the offender will commit a bigger and better crime. U.S. v. Dillon, 183 F.Supp. 541 (S.D.N.Y. 1960)

The function of the police in our society is to arrest those committing crime and see that they are brought to trial for their offenses. Although the lawbreaker has no right per se to be arrested, society does have a right to be protected against one known to have committed a crime. The issue here then is not the right of the accused to be arrested, but the duty of the police to make the arrest. And corollary to this concept runs

unto the accused the Sixth Amendment right to be placed on immediate notice of the government's awareness that the crime has been committed, thus affording him the opportunity to begin, with counsel, the preparation of his defense. Escobedo v. U.S., supra; Jones v. U.S., 119 U.S.App.D.C. 284, 292 (1964); 342 F.2d 863. Innocence is still the presumption, and it cloaks the accused until wiped away by proof of guilt at the trial.

It goes without saying that the deliberate forestalling of issuance of complaint and arrest warrant prevented an immediate trial of the appellant. Purposeful delay on the part of the narcotic squad in issuance of the complaint and warrant violate the speedy trial right guaranteed to appellant as obviously no trial could be held until the police initiated these procedures as they necessarily must precede bringing him to trial. Deliberate delay in instituting these procedures are as repugnant to the speedy trial concept as is an unwarranted delay on the part of the government after charges have been filed and the proceedings instituted. U.S. v. Dillon, supra.

Further, the appellant contends that the practice of the narcotic squad in not making immediate arrests where violations of the narcotic laws are alleged to have taken place in the presence of a narcotic officer or agent, violates the intent and purpose of Title 26 United States Code Section 7607(2),

as well as the common law authority given police officers to make arrests without a warrant where the felony is committed in the officer's presence or he has reasonable grounds to believe that such is being or has been committed.^{1/} That where this factor combines with the delay factor it operates against due process of law and a speedy trial of the accused and in so doing violates the Fifth and Sixth Amendment guarantees.

1/ Title 26 United States Code Section 7607(2) states in pertinent part as follows: "the Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury...may...(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs...where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

In discussing the need for the enactment of this provision the following appears in House Report No. 2388, June 19, 1956, accompanying H.R. 11619, as quoted in U.S. Code Congressional and Administrative News, 1956, Vol. 2, p.3283:

"The delay involved in obtaining a warrant permits the destruction or removal of the narcotic evidence and allows the narcotic traffickers to escape prosecution for their crime. These and other restrictions on enforcement officers leave the public unprotected and give narcotic violators...an advantage over law-enforcement officers in their efforts to combat the illicit narcotic traffic.

Accordingly, your committee urges that the corrective measures provided in H.R. 11619 be enacted immediately to permit enforcement officers to operate more effectively. To this end H.R. 11619 would provide for...(2) authority for Federal agents to...make arrests without warrants for narcotic violations under certain circumstances...."

II.

The appellant has been denied due process of law, the right to a speedy trial and the assistance of counsel as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States for while he was arrested within the time prescribed in the Federal statute of limitations governing the institution of criminal proceedings, a prejudicial seven (7) months delay occurred between the date the complaint and warrant issued and his accidental apprehension, despite the fact that the narcotics officers knew, or should have known, where he resided, and the officers could produce no log or record of attempts to serve the warrant on him "forthwith" at that address in substantiation of the government's claim that diligent efforts were made to serve the warrant.

1. The statute of limitations - an erroneous gauge in measuring the speedy trial concept.

Title 18 United States Code Section 3282 prohibits the government from prosecuting for crimes, other than those of a capital nature, unless an indictment is instituted within five years after commission of the offense.^{2/} This statute of limitations is most definitely not the appropriate gauge for determining whether there has been a denial of a speedy trial to the appellant.

At common law there was no such thing as a statute of limitations governing the time within which a criminal action might be prosecuted. U.S. v. Fraidin, 63 F.Supp. 271, 279 (D.C. Md. 1945) Consequently, statutes of limitations were founded upon the "liberal theory that prosecutions should not be allowed

^{2/} Title 18 United States Code Section 3282 reads as follows:

"Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

to ferment endlessly in the files of the government to explode only after witnesses and proofs necessary to the protection of the accused have by sheer lapse of time passed beyond availability". U.S. v. Eliopoulos, 45 F.Supp. 777, 781 (D.C.N.J. 1942) See also U.S. v. Bonanno, 177 F.Supp. 106 (S.D.N.Y. 1959) rev'd on other grounds. Actually, enactment of the aforementioned statute of limitations was completely consistent with, and bears out, the guarantees of the Fifth and Sixth Amendments.

As the statute begins to run from the date of the commission of the alleged offense, it permits the government to prosecute the offender where the crime and the offender are discovered within the statutory period. In effect, the statute becomes a shield to the offender as it bars his prosecution on aged and untrustworthy evidence and serves to cut off prosecution for the crime within a reasonable time after completion when no further danger to society is contemplated from the criminal activity. U.S. v. Bonanno, supra.

Being a shield, the statute cannot be used as a sword. And to reason that the government may purposefully delay arresting the offender for the statutory period would be putting the statute to exactly that use. Particularly would this be true where, as here, the crime has been allegedly committed in the presence of the narcotic agent. To say that the government has five years

within which to make out a better case against the appellant would be to condone conduct clearly prejudicial to the appellant and beneficial to the government and such condonation would be violative of Fifth and Sixth Amendment guarantees.

Accordingly while the cases of Nickens v. U.S., supra, and Harlow v. U.S., 301 F.2d 361 (5th Cir. 1962) say that it is "well-established" that the Sixth Amendment right to speedy trial does not arise until after a prosecution is instituted and that any delay occurring between commission of the offense and commencement of prosecution is controlled exclusively by the applicable statute of limitations, appellant respectfully submits that in accord with what has just been said concerning the purpose of the statute of limitations that his legal conclusion is completely unsound. Furthermore, appellant refutes the claim that it is a "well-established" proposition of law.

The cases of Foley v. U.S., 290 F.2d 562 (8th Cir. 1961), Hoopengartner v. U.S., 270 F.2d 465 (6th Cir. 1959); Parker v. U.S., 252 F.2d 681 (6th Cir 1958) and D'Aquino v. U.S., 192 F.2d 338 (9th Cir. 1951) relied on in support of this ill-conceived and misleading legal conclusion make no reference to the statute of limitations. What they do say is that the speedy trial guarantee attaches once a "formal complaint" or "charge" has been instituted against an accused.

The Harlow case, supra, cites only Hoopengartner, supra; Hoopengartner cites only D'Aquino, supra, and D'Aquino, supra, cites nothing! Nickens, supra, cites these same authorities plus several others which with the exception of U.S. v. Hoffa, 205 F.Supp. 710, 720-721 (S.D.Fla. 1962) make no mention of the statute of limitations. It is most unfortunate that the Nickens case, supra, compounds the fallacy of Harlow, supra. In the dissent in Harlow, supra, page 375 Judge Rives indicates that he does not believe that it is "well-established" law that the right to a speedy trial guaranteed by the Sixth Amendment does not arise until after a prosecution is instituted. Particularly as he so aptly points out this would not seem to be the case in the absence of a controlling decision of the Supreme Court.

Therefore, appellant submits that the rule enunciated in Nickens, supra, and Harlow, supra, is not well-established and that the trial court was in error in ruling that so long as the arrest was made within the statutory period of time it could not violate the speedy trial guarantee of the Sixth Amendment.

(Tr. Vol. 1, Feb. 14, 1964, pages 3 and 4)

2. Delay in arresting was prejudicial to appellant.

Due process of law of the Fifth Amendment encompasses other specific constitutional guarantees such as, for example, the Sixth Amendment guarantee of speedy trial and right to counsel. See Casias v. U.S., 315 F.2d 614 (10th Cir. 1963); Lane v. Warden, Maryland Penitentiary, 320 F.2d 179, 186 (4th Cir. 1963); and Baker v. Hudspeth, 129 F.2d 779 (10th Cir. 1942)

The following cases indicate that where there has been unnecessary delay, as shown by the facts in the particular case, on the part of the government in arresting the defendant or in otherwise bringing him to trial, the delay encountered reaches denial of due process proportions which in reality overlap with the speedy trial guarantee of the Sixth Amendment. These cases are: Ross v. U.S., ___ U.S.App.D.C. ___, ___ F.2d ___ (No. 17,877 decided June 30, 1965); U.S. v. Bradford, 231 F.Supp. 187 (S.D.N.Y. 1964); U.S. v. Simmons, 338 F.2d 804 (2nd Cir. 1964); Wilson v. U.S., 325 F.2d 224 (C.A.D.C. 1963); State v. Wong, 380 P.2d 439 (Haw. 1964); Keller v. Tinsley, 335 F.2d 144 (1964); dissent in Tee Ann Wilson v. U.S., ___ U.S.App.D.C. ___, ___ F.2d ___ (No. 17,895 decided Feb. 13, 1964); Nickens v. U.S., 323 F.2d 808,812 (C.A.D.C. 1963); Taylor v. U.S., 238 F.2d 259 (1956); Petition of Provoo, 17 F.R.D. 183, aff'd 350 U.S. 857 (1955).

There is no question but that in this case the Sixth Amendment guarantees began to run on March 15, 1963, when the complaint and warrant issued. (J.A. 14 and 15) But appellant contends that when the six (6) months delay in issuing the complaint and warrant was increased by an additional delay of seven (7) months until arrest and two additional months until indictment, the total delay of about fourteen (14) months in and of itself operated to the prejudice of the appellant. Any delay which is purposeful and without just cause is unreasonable delay in prosecuting or attempting to prosecute one suspected of having committed a crime and in its unreasonableness becomes prejudicial. Hanrahan et al v. U.S., ___ U.S.App.D.C. ___, ___ F.2d ___ (Nos. 18,038, 18040, and 18,041 decided June 24, 1965); Taylor v. U.S., supra; Petition of Provoo, supra.

But here the prejudice due solely to the delay was augmented by the additional factor that the appellant found it impossible to call to memory his whereabouts on the evening in question or the people he might have been with or what he might have been doing at that time (J.A. 7(a)-7(d); Tr. Vol. I, June 24, 1965, page 9) And this is understandable as he had no real reason to retain that specific date or such other information in his memory. Ross v. U.S., ___ U.S.App.D.C. ___, ___ F.2d ___ (No. 17,877 decided June 30, 1965) To the contrary it would have been rather surprising if, after the lapse of time here encountered,

the appellant could have recalled with specificity the details of his activities of the date and time in question.

III

The culmination of all the factors present in this case result in a denial to the appellant of due process of law, speedy trial and assistance of counsel as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States.

1. The prejudicial effect of the sum total of the delays encountered amounting to nearly fourteen (14) months delay between date of alleged offense and actual indictment.

There are three categories of delay in this case. First, the six (6) months lapse of time between the alleged commission of the offense and the issuance of the complaint and warrant. As heretofore stated in Argument I appellant contends this period is not governed by the statute of limitations but that his right to due process of law and speedy trial attached at the time the alleged offense was committed in the view of the narcotic officer.

Next the seven (7) months delay between time of issuance of complaint and warrant and the actual apprehension of the appellant. As set forth herein in Argument II, clearly once the complaint and warrant issued the right to speedy trial attached and in view of the fact that this delay when added to the six months initial delay caused a delay of time which in and of itself was prejudicial. Such prejudice was enlarged by the inability of the appellant to recall his whereabouts at the date and time in question caused not only a denial of his right to speedy trial but violated his entitlement to due process of law.

An additional two months delay was encountered between arrest and actual indictment. (J.A.13) Why this delay occurred was never brought to light and its only significance is that it increased by two months the over all delay of the judicial process.

2. Failure of police to make an immediate arrest.

The alleged offense took place in the very presence of the narcotic officer. An arrest could have been made at that very moment in accordance with both common law doctrine and the statutory provision of the narcotic laws empowering the narcotic agent to make an on the spot arrest when the narcotic violation occurs in his presence. Yet, no arrest was made. (Tr. Vol. I, June 28, 1965, page 54.)

3. The arrest warrant must be served in accordance with its terms - delay in the serving is prejudicial to the person charged.

With respect to the arrest warrant itself, it must be executed within a reasonable time or it becomes stale. The very language of the warrant directs that the person therein named must be brought "forthwith" before the nearest available United States Commission to answer the complaint charged. (J.A.15) In Seymour v. U.S., 177 F.2d 732 (C.A.D.C. 1949), the court said that the term "forthwith" is equivalent to stating that the person

named in the warrant must be brought in within a reasonable time, promptly and with reasonable dispatch. And in Carlo v. U.S., 286 F.2d 841 (2nd Cir. 1961) Judge Smith in his concurring opinion at page 849 says: "Even a warrant, obtained in obedience to the Constitutional requirements for warrants of arrest should be executed with reasonable promptness or it may become stale." And in Di Bella v. U.S., 284 F.2d 897, at page 906-907 (2nd Cir. 1960) Judge Waterman in a dissent says this about an arrest warrant:

"It is true enough that in cases where the officer has been armed with a valid arrest warrant the rule appears to be that the warrant need not be executed at the first opportunity. But, on the other hand, execution should not be unreasonably delayed...The unreasonableness of a delay would depend upon the circumstances present in the particular situation, but thus far no case has been called to my attention, and I have not discovered any, where the courts have approved as reasonable an interval longer than a month between the issuance and the execution of the warrant where there has been opportunity in the meantime to make the arrest." (Emphasis supplied) Di Bella v. U.S., 284 F.2d 897, at page 906-907.

In 5 Am Jur 2d Arrest, Sec. 17, page 709 the statement is made:

"In order to justify an arrest under a warrant, the officer must act in strict compliance with the law, and his failure to do so makes him a trespasser ab initio. He must show that he has done all that was commanded by the warrant, or some legal reason for not having done so."

Further an arrest warrant should be served upon the person charged therein. This is implicit it would seem under Rule 4(c)(4) of the Federal Rules of Criminal Procedure which states in pertinent part that "The officer executing a warrant shall make return thereof to the commissioner or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to the commissioner by whom it was issued and shall be cancelled by him...". If the warrant need not be served, no return would be needed; simply when the person is apprehended he would be brought in. Additionally, the rule requires unexecuted warrants to be returned to the United States Commission upon the direction of the United States Attorney. True, the United States Attorney has discretion under the rule in this respect. However, the rule indicates that there must be some system devised which shows what warrants are outstanding and when and by whom attempts to serve the warrant were made.

Yet, here in this case the defendant was never served with the arrest warrant (Tr. Vol. I, June 24, 1965, pages 22 and 24; Vol 1, Feb. 14, 1964, page 15) and no log or record of attempts to serve the appellant with the arrest warrant was kept by the narcotic squad. (Tr. Vol I, June 24, 1965, pages 57 and 58.)

4. Inability of appellant's counsel to prepare and conduct defense due to lapse of time which caused lack of memory of appellant.

The trial of appellant was no more than a perfunctory proceeding; a sham; complete form without substance. The defendant maintained his innocence yet due to the delays encountered he could remember no witnesses who might have been called to testify in his behalf. His word alone against that of the police officer amounted to very little. His "not guilty" plea was his sole defense. (Tr. Vol I, June 28, 1965)

5. Failure of the government to produce a record or log of attempts to "forthwith" serve the arrest warrant, and conflict in testimony in this respect.

At the hearing on the second motion to dismiss the indictment the appellant took the stand and testified that between September 1962 and October 1963 he resided at 1407 A Street, S.E., Washington, D.C.; that he was out of town only on overnight trips during this period of time; that he had no knowledge of an arrest warrant having been issued against him; and that he moved about the neighborhood openly and in plain view of his neighbors both in the day and night time; that the 1407 A Street address appeared on his bank account, his automobile registration, his driver's license, his learner's permit, his insurance record payments (Plaintiff's Exhibit 2) and his automobile record payments (Plaintiff's Exhibit 1). (Tr. Vol I, June 24, 1965, pages 19-24.)

(It had been brought out at the hearing on the first motion to dismiss the indictment that just two days before the complaint issued, the appellant had been before the Court of General Sessions, being under bond at that time (Tr. Vol. I, Feb. 14, 1964, page 3); hence, easily accessible for service of the warrant.

Appellant's barber, Mr. Brodey Moore testified that he saw the appellant during the period of time in question in and about the neighborhood of 1407 A Street, S.E. at various times during the day about every other day or as often as three or four times a week (Tr. Vol I, June 24, 1965, pages 43 and 44) and his aunt, Mrs. Caroline Perry, testified that she lived with the appellant at 1407 A Street, S.E. during the time in question, and that he did not go away during that time or take trips out of the city to her knowledge. (Tr. Vol. I, June 28, 1965, pages 50-51)

At the first hearing Officer Bertram Fogle of the narcotics squad was asked the following question with respect to his attempts to serve the arrest warrant:

"Q. How many times did you go knock on the door, sir at 1407?

A. We never went and knocked on the door...(Tr. Vol. I, Feb. 14, 1964, page 15)

At the second hearing Officer Fogle testified that no log or record is kept of attempts to serve an arrest warrant, that the record is kept of attempts to serve such warrants only from his memory. (Tr. Vol I, June 24, 1965, page 57) Despite the officer's testimony at the earlier hearing that he never went and knocked at the door of 1407 A Street, he testified different when asked by the Court at the second hearing as to whether he had testified at the earlier hearing that he never went to the premises:

"A. I never testified I never went to the defendant's premises." (Tr. Vol I, June 24, 1965, page 61)

6. Conflicting testimony of the narcotics agent respecting identification of the defendant.

Aside from the inability of the appellant to recall the events of the date in question due to the passage of time, the defense was confronted with two additional obstacles. First, the fact that the person who allegedly committed the offense was not known to the narcotic agent but had been identified to him on the evening in question through the hearsay evidence of the addict-informer (Tr. Vol. I, June 28, 1965, page 6-7, 38, and 50; Preliminary Hearing Transcript page) and second, the only place where the addict-informer had apparently ever been in the presence of the defendant was when they were inmates at Lorton

Penitentiary. (Tr. Vol. II, June 26, 1965, page 7.) The addict informer was not present at the preliminary hearing and there was testimony given by Officer Fogle at the hearing on the second motion to dismiss that 101 arrest warrants were issued the day that the warrant for the appellant was issued. (Tr. Vol. I, June 24, 1965, page 57)

At the preliminary hearing the narcotic agent, Mr. Moore, testified that the appellant was wearing a light colored sport coat and light colored trousers and that he and Atria Harris crossed the street and approached the defendant King on the other side. There was no mention about a car at that time. (Tr. Preliminary Hearing pages 3 and 5.) At the trial, however, Mr. Moore testified that the appellant was dressed with a dark possibly brown sport coat. He had on a dark pair of trousers and a kind of light sport shirt and dark shoes and that the appellant crossed the street and came to where he and Atria Harris were in the car. (Tr. Vol I, June 28, 1965, page 49 - 52.)

7. Fact that the government's sole witnesses at the trial were two persons having a direct interest in the outcome of the case.

The only witnesses the government produced at the trial were Atria Harris, the addict-informer (Tr. Vol I, June 28, 1965, pages 24 and 37) and Rufus Moore, the narcotic agent. It is

obvious that the narcotic officer had an interest in the case in that his very job is the apprehending of narcotic law offenders. Artria Harris' interest was that he got paid for his informing duties. (Tr. Vol I, June 28, 1965, page 23) See Fletcher v. U.S., 81 U.S.App.D.C. 306, 158 F.2d 321 (1946).

Hence, the convicting testimony was given by only these two interested witnesses. Whether their testimony can be corroborative of each other on the factual pattern of this case poses an interesting question of law. Despite the cases that have held such testimony is corroborative - so long as the jury is adequately warned of the interest involved - and those that hold that the uncorroborated testimony of the narcotic agent himself is sufficient to convict, the principle violated is as old as the Magna Carta itself. In Magna Carta, A Commentary on the Great Charter of King John, William Sharp McKechnie, 2nd Ed. Burt Franklin N.Y. 25, N.Y. 1914, the great document appears and at Chapter 38 thereof is the following:

"Nullus ballivus ponat de cetero aliquem ad legem simplici loquela sue, sine testibus fidelibus ad Nos inductis"

"No bailiff for the future shall, upon his own unsupported complaint, put anyone to his 'law' without credible witnesses brought for this purpose.

"The exact nature of the abuse here condemned has been much discussed by commentators. Bailiffs (the word is probably used here in its widest sense - it possibly includes sheriffs and their officers) were wont to abuse their authority; henceforth they shall put no man to his "lex" on their own initiative. The word lex, in its technical sense, applied to any form of judicial test...In the present chapter it seems to have this technical meaning of a judicial 'proof' or 'trial' of any sort.

And in the same text at page 373 appears the following:

"It is perhaps only another aspect of the same explanation to regard the clause as directed mainly against unfair treatment of accused men in criminal prosecutions. No one ought to be put to his 'lex' in the sense of 'ordeal' on mere grounds of vague suspicion or on the unsupported statement of a royal bailiff...

To the criminal aspect of the matter, the Assize of Clarendon (1166) seems to supply the key. Article 4 of that ordinance prescribes the procedure for trying robbers, thieves, and murderers: 'the sheriff shall bring two law-worthy men of the hundred and of the village where they were apprehended, to bear the record of the country and of the hundred, as to why they had been apprehended; and, there, before the justices they shall make their law.'...and the purport of the whole was that accused men could not be put to ordeal except in presence of two lawful men who had been present at the indictment and had come before the justices specially to bear witness thereof. In other words, the sheriff's own report of the indictment "sine testibus fidelibus ad hoc inductis" was not sufficient."

CONCLUSION

Appellant contends that because of the violation of his rights guaranteed him by the Fifth and Sixth Amendments of the Constitution of the United States which rights have in this case been violated resulting in his having been denied due process of law, a speedy trial and assistance of counsel, that the Motion to Dismiss the Indictment should have been granted.

Respectfully submitted,

Mary M. Burnett
Mary M. Burnett
1001 Connecticut Avenue N.W.
Washington, D.C.
347-3623

December 20, 1965

CERTIFICATE OF SERVICE

I, Mary M. Burnett, hereby certify that I have personally served a copy of the foregoing brief for appellant upon the United States Attorney, U.S. Court House, Washington, D.C.

Mary M. Burnett
Mary M. Burnett

NOTICE OF APPEAL CRIMINAL

United States District Court for the District of Columbia

UNITED STATES OF AMERICA

vs.

Criminal No. 1214-63

WILBURT KING

NOTICE OF APPEAL**FILED****Name and address of appellant**Wilburt King
District of Columbia Jail

SEP 17 1965

HARRY M. DILL, CLERK

Name and address of appellant's attorneyMary M. Burnett
1001 Connecticut Ave., N.W., Washington, D.C.
phone: 347-3623**Offense** violation of Harrison Narcotic Act**Concise statement of judgment or order, giving date, and any sentence**

Sentenced by Judge Curran on September 10, 1965, to seven (7) years to run concurrently with the sentence in Cr. 510-65.

Name of institution where now confined, if not on bail

D.C. Jail

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

September 16, 1965

Date

Appellant

Mary M. Burnett
Mary M. Burnett

Attorney for Appellant.

#500-02-1

Statement of Docket Entries

Cr. Form No. 27

United States District Court

FOR THE
DISTRICT OF COLUMBIA
DIVISION

UNITED STATES OF AMERICA

v.

WILBURT KING

Crim.
No. 1214-63

- * 1. Indictment or information for **Vio. T. 26 U.S.Code 4705a, 4704a,**
21 U.S.Code 174
Filed Dec 23 19 63
2. Arraignment
Appearance of John A. Shorter, Jr. entered Jan 3 19 64
3. Plea to indictment or information **Not Guilty** Jan 3 1964
- Bond Forfeiture Declared Sep. 15 1964
4. ~~Motion to withdraw plea of guilty denied~~
Bench Warrant Ordered and issued Sep. 15 19 64
5. ~~Trial by jury or by court if jury waived~~
Defendant COMMITTED to District of Columbia Jail Apr 27 19 65
6. Verdict on finding of guilt
Defendant's Oral Motion to set bond heard and DENIED 19
McGUIRE Judgment (with terms of sentence) or order May 3 1965
- Oral Motion of Defendant to set bond heard and DENIED 19
May 7 1965
8. Notice of appeal filed May 11 19 65
- Clerk's Fee \$5.00 paid and credited to U.S.
Dated

* Bond - \$2,500.00
D.E. Resnick, Surety.
11-27-63

Attest HARRY M. HULL

Clerk.

By: Helen M. Hull
Deputy Clerk

Statement of Docket Entries

Cr. Form No. 27

United States District Court

FOR THE
DISTRICT OF COLUMBIA
DIVISION

UNITED STATES OF AMERICA

v.

WILBURT KING

Criminal
No. 1214-63

1. Indictment on information for VIO. T.26, U.S.C. 4705a, 4704a; 21 USC 174
(Vio. Narcotic Laws)
Filed Dec. 23 19 63
2. Arraignment Jan 3 19 64
3. Plea to indictment ~~Guilty~~ NOT GUILTY Jan 3 1964
19
- APPEARANCE of Mary M. Burnett entered and filed
4. Motion to withdraw plea of guilty denied May 18 1965

19
5. Trial by jury, or by court if jury waived
CURRAN, J. June 28 1965
19
6. Verdict or finding of guilt GUILTY as indicted June 28 1965
19
7. Judgment—(with terms of sentence) or order SENTENCED to imprisonment for a period
of 7 Years said sentence to run CONCURRENTLY with sentence imposed in
Criminal 510-65 Entered Sept 10 1965
- JUDGMENT and COMMITMENT of 9-10-65, filed Sept 14 1965
8. Notice of appeal filed Sept 16 19 65
(Clerk's Fee \$5.00 paid and credited to U.S.)
Dated

Attest HARRY M. HULL

Clerk.

By: Helen M. [Signature]

Deputy Clerk

BEST COPY
from the original

FOR TIME

DISTRICT OF COLUMBIA

v.

Criminal

No. 1214-63

SEP 14 1965

HARRY M. HULL, CLERK

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of

Violation of Sections 4704a, 4705a, T-26, U. S. Code
and
Section 174, Title 21, U. S. Code

as charged'

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Seven (?) Years, said sentence to run concurrently with the sentence imposed in Criminal Case No. 510-65.

11/11/11 11/11/11 11/11/11 11/11/11

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to: State Prison, 10 years

Clark.

Insert "by counsel or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. Insert "in count(s) number _____" if required. *Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. *Enter any order with respect to suspension and probation. *For use of Court wishing to recommend a particular institution.

BY AVAILABLE
original bound volume

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff

v.

Criminal No. 1214-63

WILBURT KING,

Defendant

FILED

JUL 2 - 1965

HARRY M. HULL, Clerk

MOTION FOR ACQUITTAL OR IN
THE ALTERNATIVE FOR A NEW TRIAL

Comes now the defendant Wilburt King in the above entitled case and moves this Honorable Court for a judgment of acquittal notwithstanding the verdict of the jury or in the alternative for a new trial, and submits that this motion be granted on the following grounds:

1. That there was insufficient identification of the defendant Wilburt King as being the individual involved in the alleged narcotic transaction of September 29, 1962, as set forth in the indictment.
2. That there was a lack of corroboration in the trial of the fact that the defendant Wilburt King was the individual involved in the alleged narcotic transaction.
3. That the delay which was incurred between the date of the alleged violation of the narcotic laws and the arrest and prosecution of the defendant Wilburt King was prejudicial to him in that he was unable to properly defend himself due to the lengthy passage of time and hence such delay violated guarantees of the Fifth and Sixth Amendments to the United States Constitution.

Respectfully submitted,

Mary M. Burnett
Mary M. Burnett
Attorney for the Defendant
1826 Jefferson Place, N.W.
Washington, D.C.
333-0200

FILED

AUG 1 - 1965

HARRY M. HULL, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JUL 2 - 1965

HARRY M. HILL, Clerk

UNITED STATES OF AMERICA,
Plaintiff

v.

Criminal No. 1214-63

WILBURT KING,

Defendant

POINTS AND AUTHORITIES ACCOMPANYING
DEFENDANT'S MOTION FOR ACQUITTAL OR
IN THE ALTERNATIVE FOR A NEW TRIAL

1. Rule 29 Federal Rules of Criminal Procedure.
2. Rule 33 Federal Rules of Criminal Procedure.
3. Ross v. U.S., No. 17,877, June 20, 1965
U.S. Court of Appeals for the District of
Columbia Circuit.
4. Taylor v. U.S., 99 U.S.App.D.C. 183, 238 F.2d 259.
5. Petition of Provoe, 17 F.R.D. 183 (D.Md.), aff'd
350 U.S. 857 (1955)
6. Wilson v. U.S., 117 U.S.App.D.C. 28 (1963), 325
F.2d 224.

Respectfully submitted,

Mary M. Burnett
Mary M. Burnett
Attorney for Defendant
1826 Jefferson Place, N.W.
Washington, D.C.
333-0200

United States District Court for the District of Columbia

FILED

JUN 25 1965

UNITED STATES

vs.

WILBURT KING

Defendant

HARRY M. HULL, CLERK

CRIMINAL No. 1214-63CHARGES 26 USC 1705a, 1701a;
21 USC 174

On this 25th day of June, 1965, came again the parties aforesaid, in manner as aforesaid; whereupon the hearing on the defendant's motion to dismiss the indictment is resumed; and thereupon the motion is denied.

The defendant is remanded to the District Jail.

By direction of

EDWARD M. CURRAN

Presiding Judge
Criminal Court # 3

HARRY M. HULL, Clerk

Present:

United States Attorney

By Joel Blackwell
Assistant United States AttorneyB. Williamsen
Official ReporterBy [Signature]
Deputy Clerk

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILBURT KING.

Defendant .

MARK 1121 604

Criminal No. 1214-63

The delay on the part of the Government was purposeful and deliberate, operating to the detriment of the defendant, Wilburt King, and to the advantage of the Government, in that the defendant at all times pertinent to this motion could easily have been served with an arrest warrant, as he resided within the District of Columbia at 1407 "A" Street, S.E., Washington, D.C.

-2-

The delay in failing to serve the defendant with the arrest warrant issued in his name on March 15, 1963, was prejudicial in that due to the lengthy passage of time, the memory of the defendant has paled with respect to his whereabouts on the evening of September 29, 1962, the date of the alleged offense, or of his companions of that evening, and likewise has grown dim the memory of other persons who might have come to assist him in recalling the events of the particular time in question.

Thus, due to the delay here encountered, the defendant has been denied due process of law as guaranteed him by the Fifth Amendment of the United States Constitution in that he was not brought to trial expeditiously and in the manner truly envisioned in the Constitutionally guaranteed concept of "speedy trial" as set forth in the Sixth Amendment of the United States Constitution.

As further reasons and ground for the dismissal of this indictment, the defendant states as follows:

(1) That as a result of the Government's inaction, the following delays were encountered:

- (a) a delay of six and one half months between the date of the alleged offense and the issuance of an arrest warrant (alleged offense said to have been committed September 29, 1962, and the warrant for arrest issued March 15, 1963);
- (b) an additional delay of nearly seven months, from March 15, 1963, until October 28, 1963, between the issuance of the arrest warrant and the actual arrest of the defendant;
- (c) a delay of nearly two additional months between the date of the arrest, October 28, 1963, and service of the indictment on the defendant on December 26, 1963;
- (d) a cumulative delay of twelve months and twenty-nine days between the date of the alleged offense and the arrest of the defendant and of fourteen months and twenty-six days between the date of the alleged offense and service of the indictment.

-3-

(2) That at no time has the defendant ever seen the arrest warrant issued in his name on March 15, 1963;

(3) That the defendant first gained knowledge of the alleged offense on October 28, 1963, when he was arrested in broad daylight during regular business hours as he was coming out of the Municipal Center located in the 300 block of C Street, N.W., directly behind the United States Court House;

(4) That at no time from the date of September 29, 1962, the date of the alleged offense, until October 28, 1963, the date of his arrest, had the defendant been on extended stays out of this jurisdiction or in hiding or in any way attempting to avoid detection or arrest;

(5) That, to the contrary, he had resided at 1407 "A" Street, S.E., Washington, D.C., with his aunt, Mrs. Caroline Perry, during all times herein relevant;

(6) That he was seen by his neighbors to go about the neighborhood openly and frequently, entering and leaving 1407 "A" Street, S.E., during both the daytime and nighttime, and parking his car on "A" Street, S.E., in front of his residence;

(7) That he personally made weekly cash payments on his automobile at Franklin Investment Company, Inc., 206 Indiana Ave., N.W., Capital Hill Building, Washington, D.C.

(8) That he likewise made certain cash payments in person at the Armorplate Insurance Inc., 2218 Rhode Island Ave., N.E., Washington, D.C., on his automobile insurance;

(9) That in December, 1962, he obtained a learner's driving permit to drive an automobile and shortly thereafter in 1963 he obtained his driver's permit by personally going into the Division of Motor Vehicles to obtain same;

-4-

(10) That he maintained an account with Riggs National Bank, Washington, D.C., giving 1407 "A" Street, S.E., Washington, D.C., as his address:

(11) That in 1963 he worked for his brother, Joseph King, in a restaurant known as Joe and Joe's Lounge located off Alabama Avenue, S.E., Washington, D.C., and during the time he worked there, his sister-in-law, Estelle King, likewise worked there:

(12) That he frequented Brodie Moore's Barber Shop, 1100 8th Street, S.E., Washington, D.C., and often conversed with the proprietor, Brodie Moore, and others during the time here in question:

(13) That he was under arrest in February, 1963, and his case set for trial in the D.C. Court of General Sessions in March, 1963, but that prior to Easter in 1963, said case was dismissed by the Government for want of prosecution:

(14) That as has been shown above, the defendant went regularly about his business and not in the manner of one seeking to avoid arrest and that his whereabouts were known to his friends, acquaintances, relatives, neighbors, and could have been easily ascertainable by the police upon reasonable inquiry and effort.

Mary M. Burnett
Mary M. Burnett
1826 Jefferson Place, N.W.
Washington, D.C.
333-0200

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion to Dismiss Indictment was personally served upon the United States Attorney, David C. Acheson, at his office in the United States Courthouse, Washington, D.C., this 23rd day of June, 1965.

Mary M. Burnett

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JUN 24 1965

UNITED STATES OF AMERICA,
Plaintiff,
v.
WILBURT KING,
Defendant.

HARRY M. HALL, CLERK
Criminal No. 1214-63

POINTS AND AUTHORITIES IN SUPPORT
OF THE DEFENDANT'S MOTION TO DISMISS
THE INDICTMENT

Due process of law of the 5th and 14th Amendments to the United States Constitution encompasses other specific constitutional guarantees. Baker v. Hudspeth, (10th Cir. 1942), 129 F.2d 779.

The Supreme Court of the United States apparently has not to date ruled that the time between the commission of an alleged offense and the actual arrest of the defendant is not within the "speedy trial" concept of the Sixth Amendment of the United States Constitution.

A number of cases have held that this lapse of time between commission of the alleged offense and arrest is governed by the statute of limitations. These cases have held that the right to a speedy trial does not exist until after there has been either a formal complaint lodged against the defendant, or a charge pending, or an institution of the prosecution. But none of the cases define specifically what these terms mean. In failing to indicate whether by formal complaint or pending charge is meant the complaint, for example, upon which an arrest warrant issues, or whether some other stage in the criminal proceeding is alluded to leaves unclarified the exact point at which the "speedy trial"

- 2 -

concept attaches. Nickens v. U.S., (C.A.D.C. 1963), 323 F.2d 808; Harlow v. U.S., (5th Cir. 1962), 301 F.2d 361; Hoopesgarner v. U.S., (6th Cir. 1959), 270 F.2d 465; Foley v. U.S., (8th Cir. 1961), 290 F.2d 562; Parker v. U.S., (6th Cir. 1958), 252 F.2d 681; D'Aquino v. U.S., (9th Cir. 1951) 192 F.2d 338.

At common law there was no such thing as a statute of limitations or rather a limitation per se as to the time in which a criminal action might be prosecuted. The purpose of the statute of limitations was in effect to help preserve the speedy trial concept in that it definitely established a cut off date after which a person could not be prosecuted for an alleged offense. As the statute begins to run from the date of the commission of the alleged offense it permitted the government to prosecute where the offense was discovered within the statutory period. Its purpose was not to give the government five years in which to make out a better case against a defendant where, for example, the government has knowledge from the moment an alleged offense has been committed that such offense has been committed. Reasoning which would permit the government to prosecute an alleged offense, which the government has reason to know was committed, at any time it pleases up to the last day of the fifth year of the statutory period of time runs into direct contradiction with the constitutional guarantee of due process of law as well as that of a speedy trial.

In Harlow v. U.S., supra, the court stated that:

"It is well established that the right to a speedy trial guaranteed by the Sixth Amendment and implemented by Rule 48(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. does not arise

- 3 -

until after a prosecution is instituted against the accused. Any delay occurring between commission of the offense and commencement of prosecution is controlled exclusively by the applicable statute of limitations." Harlow v. U.S., 301 F.2d 361, at page 366.

While the court said this was a "well established" principle of law it cited only one case for the proposition and that was the case of Hoopengartner v. U.S., (6 Cir. 1959), 270 F.2d 465. The Hoopengartner case cites a single authority in this respect the case of D'Aquino v. U.S., supra, and in so doing simply says "It has been held that the constitutional right to a speedy trial does not arise until after such formal complaint has been filed." And the D'Aquino case, supra, cites no cases at all for the proposition.

It is little wonder then that Judge Rives, while concurring in the result in the Harlow case, supra, nevertheless had the following to say respecting the legal proposition in question:

"The statement in the opinion that the right to a speedy trial guaranteed by the Sixth Amendment does not arise until after a prosecution is instituted against the accused is supported by several opinions of Courts of Appeals. See Foley v. U.S., (8th Cir 1961), 290 F.2d 562, 565 and cases there cited. It does not seem to me, however, that that proposition is 'well established' in the absence of a controlling decision of the Supreme Court; and, with deference, I am not convinced that it is sound...." Harlow v. U.S., 301 F.2d 361, at page 375. (Emphasis Supplied.)

The following cases indicate that where there has been unnecessary delay, as shown by the facts in the particular case, on the part of the government in arresting the defendant or in otherwise bringing him to trial, the delay encountered reaches denial of due process proportions which in reality overlap with the speedy trial guarantee of the Sixth Amendment.

- 4 -

These cases are: U.S. v. Bradford, (2nd Cir. 1964) 231 F. Supp. 187; U.S. v. Simmons, (2nd Cir. 1964) 338 F.2d 804; Wilson v. U.S., (C.A.D.C. 1963), 325 F.2d 224; State v. Wong, (Haw. 1964), 380 P.2d 439; Keller v. Tinsley, 1964, 335 F.2d 144; dissent in Tee Ann Wilson v. U.S., No. 17895, Feb. 13, 1964, Court of Appeals for the District of Columbia; Nickens v. U.S., (C.A.D.C. 1963), 323 F.2d 808, 812; Taylor v. U.S., 1956, 238 F.2d 259; Petition of Provoo, 1955, 17 F.R.D. 183, affirmed 350 U.S. 857.

In the Simmons case, supra, the court lists four factors as being relevant in a consideration of whether there has been a denial of a speedy trial assuming due process proportions. These are (1) length of delay, (2) reason for delay, (3) prejudice to the defendant, and (4) waiver by the defendant.

Any delay which is purposeful and without just cause is unreasonable delay in prosecuting or attempting to prosecute one suspected of having committed a crime and in its unreasonableness becomes prejudicial. Taylor v. U.S., supra; Petition of Provoo, supra.

As for waiver by the defendant of his Constitutional rights to a speedy trial and to due process of law, there can never be said to be a waiver of that which is not within the actual knowledge of an individual. U.S. v. Dillon, (S.D.N.Y. 1960), 183 F.Supp. 541; U.S. v. Chase, (N.D. Ill. 1955), 135 F.Supp. 230.

With respect to the arrest warrant itself, it must be executed within a reasonable time or it becomes stale. The very language of the warrant directs that the person therein named is to be brought "forthwith" before the nearest available

- 5 -

U.S. Commissioner to answer the complaint. And according to the Court in Seymour v. U.S., (C.A.D.C. 1949), 177 F.2d 732, the term forthwith is equivalent to stating that the person must be brought in within a reasonable time, promptly with reasonable dispatch. In Carol v. U.S., (2nd Cir. 1961), 286 F.2d 841, Judge Smith in his concurring opinion says "Even a warrant obtained in obedience to the Constitutional requirements for warrants of arrest should be executed with reasonable promptness or it may become stale."

And in Di Bella v. U.S., (2nd Cir. 1960), 284 F.2d 897, which was a narcotic case, Judge Waterman in a dissent says this:

"It is true enough that in cases where the officer has been armed with a valid arrest warrant the rule appears to be that the warrant need not be executed at the first opportunity. But, on the other hand, execution should not be unreasonably delayed...The unreasonableness of a delay would depend upon the circumstances present in the particular situation, but thus far no case has been called to my attention, and I have not discovered any, where the courts have approved as reasonable an interval longer than a month between the issuance and the execution of the warrant where there has been opportunity in the meantime to make the arrest." (Emphasis supplied) Di Bella v. U.S., 284 F.2d 897, at page 906-907.

Respectfully submitted,

Mary M. Burnett
 Mary M. Burnett
 Attorney for the Defendant
 1826 Jefferson Place, N.W.
 Washington, D.C.
 333-0200

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion to Dismiss the Indictment was personally served upon the United States Attorney, David C. Acheson, at his office in the United States Courthouse, Washington, D.C., this 24th day of June 1965.

Mary M. Burnett

United States District Court for the District of Columbia
 FEB-14-1964

FILED

FEB 14 1964

UNITED STATES

vs.

Wilburt King

Defendant

HARRY M. HULL, Clerk

CRIMINAL No. 1214-63

CHARGE 26 USC 4705a, 4704a; 21 USC 174

On this 14th day of February, 1964, case 2 the attorney of the United States, the defendant in proper person and by his attorney, John A. Shorter, Jr., Esquire; whereupon the motion of the defendant 5 to dismiss the indictment, coming on to be heard, after arguments of counsel, is by the Court denied.

By direction of

ALEXANDER HOLTZOFF

Presiding Judge
 Criminal Court # 2

HARRY M. HULL, Clerk

Present:

United States Attorney

By Joel D. Blackwell
 Assistant United States Attorney

Gerald Nevitt
 Official Reporter

By James J. Vanecko
 Deputy Clerk

BEST COPY
 from the original

FILED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

- 5 - 1964

HARRY M. HULL, CLERK

UNITED STATES OF AMERICA :

vs. :

Criminal No. 1214-63

WILBURT KING :

MOTION TO DISMISS INDICTMENT

Comes now the defendant Wilburt King, by and through his attorney, and moves this Honorable Court to dismiss the indictment filed herein, on account of the delays in the instant prosecution. As reasons and grounds therefor, the defendant states as follows:

1. That in this case the defendant is charged with violation of the Federal Narcotic Laws arising out of the sale of a quantity of narcotics to a special employee of the Metropolitan Police Department on September 29, 1962. That on March 15, 1963, a complaint was filed with the United States Commissioner that generally set forth the facts of this offense, and upon this complaint a warrant was issued by the Commissioner calling for the arrest of the defendant.

2. That on October 28, 1963, the defendant was arrested by an officer of the Narcotics Squad of the Metropolitan Police Department in the 300 block of C Street, N. W. That at the time of his arrest the defendant first gained knowledge of this offense. That on November 26, 1963, a hearing was had before the United States Commissioner on the said complaint; the government was not required at this hearing to divulge the name of the special employee to whom the defendant had allegedly sold drugs. This information was not made known to the defendant until he read the same in his indictment.

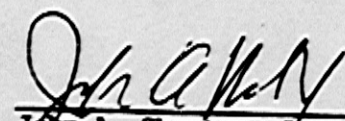
3. That from the time of the alleged commission of the offense in this case to the time of his arrest, the defendant was not in hiding, nor avoiding detection and arrest. His whereabouts were known to his

-2-

friends and acquaintances, and readily ascertainable by the police upon reasonable inquiry and effort.

3. The delay in filing the complaint and in effecting an arrest in this case was prejudicial to the defendant's rights, violated Rule 48(b) of the Federal Rules of Criminal Procedure, and also deprived the defendant of a speedy trial guaranteed him by the Sixth Amendment of the United States Constitution.

4. The defendant was prejudiced in that the fact of an alleged offense by him was not brought to his attention until thirteen (13) months after the date that it took place. At that late date it was impossible for him to remember or recall where he was or what he was doing at the time of the alleged crime. Thus the defendant cannot call witnesses at the trial herein who could establish his innocence of the offense.


John A. Shorter, Jr.
508 Fifth Street, N. W.
Washington, D. C.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was personally served upon the United States Attorney, David Acheson, at his office in the United States Courthouse, Washington, D. C., this 5th day of February, 1964.


John A. Shorter, Jr.

United States District Court
FOR THE DISTRICT OF COLUMBIA

FILED

21 1963

HARRY M. HULL, CLERK

UNITED STATES OF AMERICA

vs.

Criminal No. 1214-63

WILBURT KING

I, HARRY M. HULL, Clerk of the District Court of
the United States for the District of Columbia, do hereby certify
that on this day I gave a copy of the indictment in the above-
entitled cause to the above-mentioned defendant by mailing same
to him directed to

1407 A St. S.E. Washington, D.C.

being his address shown on the bond filed in said cause.

Date: December 26, 1963

HARRY M. HULL, Clerk.

By Helen M. Brennan
Deputy Clerk.

DEC -5 1963

FILED IN OPEN COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEC 23 1963

Holding a Criminal Term

HAROLD M. HULL, CLERK

Grand Jury sworn in on November 5, 1963

The United States of America	::	Criminal No. 1214-63
v.	::	Grand Jury No. 1430-63
Wilbert King	::	Violation: 36 U.S.C. 4705(a), 4704(a) 21 U.S.C. 174 (Sale, possession and facilitation of concealment and sale of nar- cotic drug, knowing same to have been imported contrary to law)

The Grand Jury charges:

On or about September 29, 1962, within the District of Columbia, Wilbert King did sell, barter, exchange and give away to Atria L. Harris, a narcotic drug, that is, one glassine envelope containing a mixture totaling about 140 milligrams of heroin hydrochloride, quinine hydrochloride and milk sugar, not in pursuance of a written order, written for that purpose, from the said Atria L. Harris, as provided by law.

SECOND COUNT:

On or about September 29, 1962, within the District of Columbia, Wilbert King purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, one glassine envelope containing a mixture totaling about 140 milligrams of heroin hydrochloride, quinine hydrochloride and milk sugar. This is the same heroin hydrochloride which is mentioned in the first count of this indictment.

THIRD COUNT:

On or about September 29, 1962, within the District of Columbia, Wilbert King facilitated the concealment and sale of a narcotic drug, that is, one glassine envelope containing a mixture totaling about 140 milligrams of heroin hydrochloride, quinine hydrochloride and milk sugar,

DEC-54 1203

after said heroin hydrochloride had been imported, with the knowledge of Wilbert King, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the first and second counts of this indictment.

David C. Acheson
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

Frederick W. Cappel
Foreman

DEC-54 1203

1211-63

United States District Court

for the District of Columbia
DEC -5 1963
HOLDING A CRIMINAL TERM

G. J. No. 1430-63

November N.J. 1963

District of Columbia

to wit:

Sworn in Nov. 5, 1963

We, the Grand Jurors of the United States of America, in and for the District aforesaid, upon

our oaths, do PRESENT

Wilburt King

FILED IN OPEN COURT

DEC 23 1963

THOMAS M. HOLL, CLERK

For viz: 26 U.S.C. 4705 A, 4704 A
21 U.S.C. 174

at the District aforesaid, on the 9 day of December, A. D. 1963

Fredernck W. Appel

Foreman.

J.A.-14
121-53
ComplaintUnited States District Court
FOR THE

NOA-5 D. DISTRICT OF COLUMBIA

FILED

Commissioner's Docket No. 8

UNITED STATES OF AMERICA NOV 27 1963

Case No. 316

Wilbert King

HARRY M. MULL

COMPLAINT for VIOLATION of

U. S. C. Title 26

Section 4704a 4705a

W. Lbert King

BEFORE Sam Wartleb

United States Courthouse, D.C.

Name of Commissioner

Address of Commissioner

The undersigned complainant being duly sworn states:

That on or about September 29th, 1962, at Washington, D.C.

in the

District of Columbia

(1) Wilbert King

did (2) unlawfully possess and sell a narcotic drugs to wit Heroin

And the complainant states that this complaint is based on the fact that about, 12:30 AM on September 29th 1962 the defendant Wilbert King sold 1 deck of Heroin to a Special Employee of the Metropolitan Police Department Washington D.C., for which he paid \$12.50 MPDC advanced funds furnished by Pvt. Rufus Moore, Narcotic Squad MPD who observed entire transaction in front of 751- 8th St. S.E. Washington, D.C.

And the complainant further states that he believes that Pvt. Rufus Moore, Nar. Sq. MPDC; Dets. Bertram F. Forle & Irvin Brewer Nar. Sq. MPDC

are material witnesses in relation to this charge.

Rufus Moore

Signature of Complainant

Private, Narcotic Squad

Official Title

Sworn to before me, and subscribed in my presence, March 15, 1963

United States Commissioner

(AUSA SMITHSON RECOMMENDS BOND IN THE SUM OF \$3,500.00
RETURNABLE FORTHWITH)

1211-63 J.

Form A. O. 90 (Rev. 7-26-50)

Commissioner's
Warrant of Arrest

United States District Court

117-1430-63

NOA-38. 182
FOR THE
District of Columbia

FILED

Commissioner's Docket No. 8

NOV 27 1963

Case No. 316

UNITED STATES OF AMERICA

HARRY M. HULL, Clerk

Wilbert King

WARRANT OF ARREST

To Robert V. Murray, Chief of Police, D.C. or any other person authorized to serve same

You are hereby commanded to arrest Wilbert King, and bring him
forthwith before the nearest available United States Commissioner to answer to a complaint charging him
with unlawfully possessing and selling a narcotic drug to wit Heroin on September 29th
1962, in the District of Columbia

a violation of U.S.C. Title, 26, Section 4704a 4705a

Date March 15, 1963

Here insert designation of officer to whom warrant is issued.

RETURN

Received March 15th, 1963 at Washington, D.C. and executed by arrest of
Wilbert King at 300 Rock C St. SE on October 28th, 1963.

Arrested by (Lyle)

James F. Lyle
Sgt. Thos. S. Moore

Date

District of

, 19

By Deputy

FILED
SEP 15 1964
HARRY M. HULL, CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES

VS.

WILFURT KING

✓
: :
: :
: :
: :
CRIMINAL NO. 1214-63

ORDER DECLARING FORFEITURE

Upon consideration of the motion of the United States Attorney that the bond in the sum of Twenty Five Hundred Dollars (\$ 2500.00), filed in the above-entitled cause on the 27th day of November, 1963, be forfeited, it is this 15th day of September, 1964.

ORDERED that the said motion be and the same is hereby granted, and accordingly, the said bond is hereby forfeited, and,

IT IS FURTHER ORDERED that the amount of the penal sum of the said bond, namely Twenty Five Hundred Dollars (\$ 2500.00), be paid by David E. Pesnick Surety, to the Clerk of this Court in settlement of said forfeiture.


JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

-vs-

WILBURT KING also known as
REUBEN HAROLD SALTERS

65CR261

NO.

Vio: 18 USC

3146

FILED

APR 17 1955

HARRY M. HULL, CLERK

WARRANT OF REMOVAL

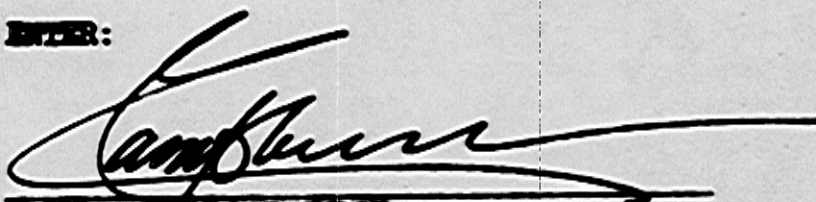
TO THE UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

This cause coming on for hearing on petition of the United States Attorney, and it appearing to the Court that the United States Commissioner for the District of Columbia has filed a complaint charging that the defendant WILBURT KING also known as REUBEN HAROLD SALTERS, having been admitted bail for appearance before the United States District Court, District of Columbia, Washington, D. C. and having forfeited the bail, wilfully failed to surrender himself within thirty days following the date of such forfeiture; and the defendant having been arrested in this District and, after waiving hearing, having been held by an United States Commissioner to this Court for removal to the District of Columbia, Washington, D. C. and the bail having been set in the amount of \$10,000;

YOU ARE HEREBY COMMANDED to remove the said WILBURT KING also known as REUBEN HAROLD SALTERS forthwith to the District of Columbia, Washington, D.C., and there deliver him to the United States Marshal for that district,

or to some other officer authorized to receive him at Washington,
D.C. for appearance before the United States District Court for the
District of Columbia, Washington, D. C.

ENTER:


U. S. DISTRICT JUDGE

Dated at Chicago, Illinois

this 10th day of April, 1965.

Admit to bail in the sum of \$10,000 conditioned for his appearance
before the United States District Court for the District of Columbia
forthwith.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America :

v. :

Criminal No. 1214-63

Milbert King :

FILED

APR 10 1965

HARRY M. HULL CLERK

MOTION TO SET ASIDE FORFEITURE

Comes now David E. Resnick, surety for the above-named defendant, and moves the Court to set aside the forfeiture of the bail in the amount of \$2,500.00, and being first duly sworn, on oath, according to law, deposes and says as follows:

1. That the bail in the amount of \$2,500.00 was forfeited by this Court on September 15, 1964, when the defendant failed to appear in Court.
2. That the defendant was apprehended in Chicago, Illinois about two weeks ago, by the Federal Bureau of Investigation resulting from information some of which was supplied by affiant.
3. That surety expended, not including automobile expenses amounting to approximately \$100.00, the sum of \$733.60 (itemized on attached list).
4. That in addition, surety made numerous long distance telephone calls to California where defendant had been apprehended previously.

Wherefore, surety, in view of the matters contained herein, prays the Court for a remission of the forfeiture of the bail in the instant case.

David E. Resnick

David E. Resnick, surety
412 - 5th St. N.W., Wash., D.C.

Subscribed and sworn to before me, this 24th day of April, 1965.

W. H. H. H.
Notary Public, D.C.

Copy of the foregoing, Motion and Attached list, served upon David C. Acheson, Esq., U.S. Attorney, U.S. Court House, Wash., D.C. this 14 day of April, 1965.

David E. Resnick
David E. Resnick

EXPENSES INCURRED IN RECOVERY OF W.KING

11/13/64	Renee Whisaker for fare to New York	\$40.00
11/15/64	Renee Whisaker via Western Union	42.18
11/17/64	Renee Whisaker via Western Union	42.18
11/18/64	Renee Whisaker via Western Union	42.08
12/1/64	Rene Whisaker via Western Union	27.03
12/2/64	Rene Whisaker via Western Union	42.18
12/3/64	Rene Whisaker via Western Union	27.03
2/7/65	Thad King via Western Union	21.98
2/7/65	Thad King via Western Union	11.98
2/9/65	Odell Glover cash	20.00
3/6/65	Odell Glover cash	12.00
11/9/64	Eastern Airlines - Chap Bowman	16.00
3/15/65	J. Masterson via Western Union	21.98
3/17/65	W. Fullwood via Western Union	16.98
3/12/65	W. Fulwood cash	50.00
3/ /65	W. Fulwood cash	<u>300.00</u>
		\$733.60

533
BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 19,739

FILED FEB 3 1966

Nathan J. Paulson
CLERK

WILBURT KING, APPELLANT

v.

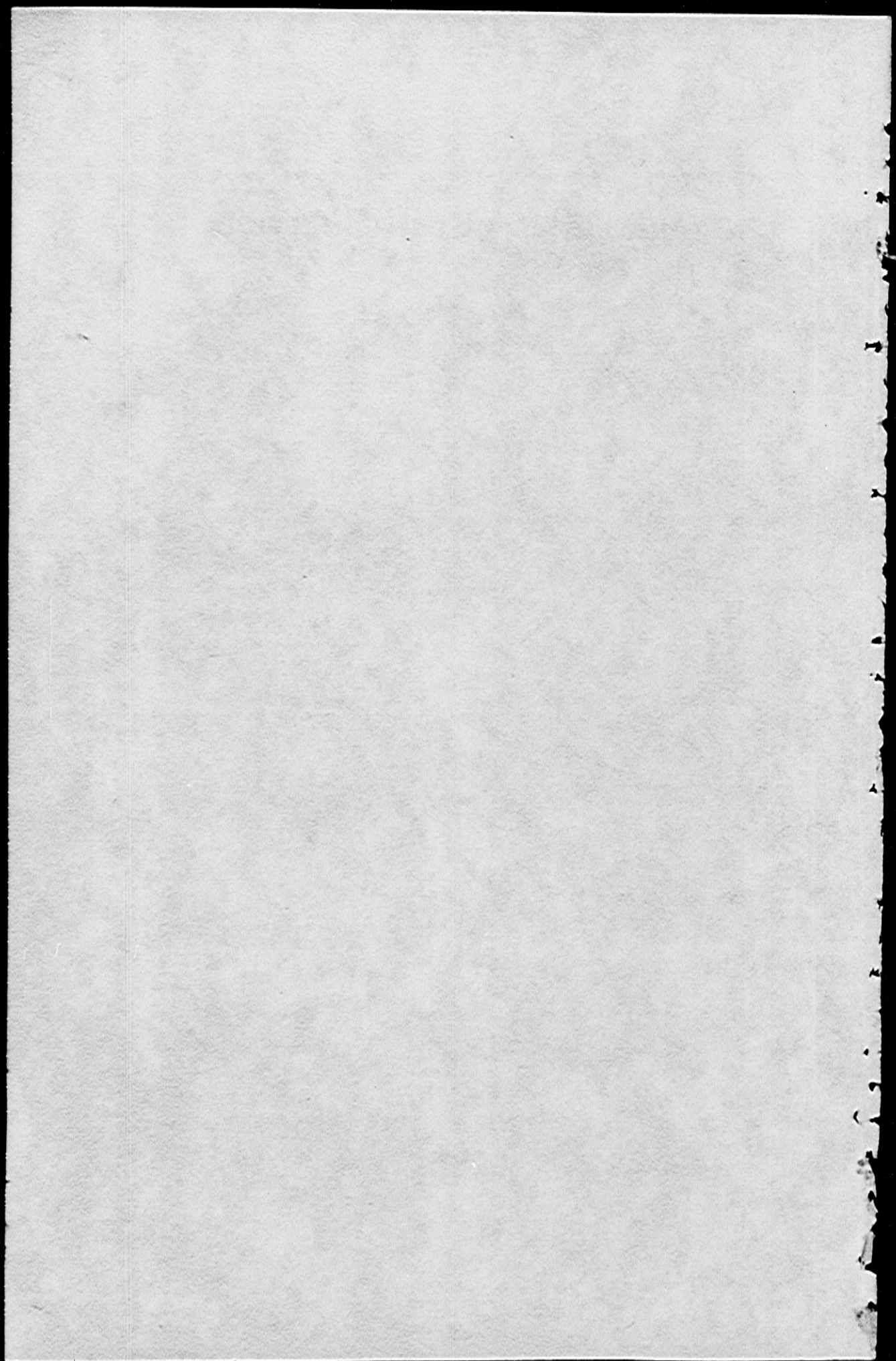
UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
DEAN W. DETERMAN,
Assistant United States Attorneys.

Cr. No. 1214-63



QUESTION PRESENTED

Should this Court use its supervisory powers to overturn a conviction on the grounds of delay between offense and arrest when it has already found the delay from offense to warrant reasonable under identical circumstances, when police tried diligently to apprehend appellant after the warrant was issued, and when appellant has failed to establish a plausible claim of prejudice, especially in view of a well-corroborated Government case with no possibility of mistaken identity?

W. F. REMINGTON
OLD STYLE

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,739

WILBURT KING, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A jury found appellant guilty of violating federal narcotics laws (26 U.S.C. §§ 4704a, 4705a; 21 U.S.C. § 174), and he was sentenced to prison for seven years. Because appellant now challenges the trial court's refusal to dismiss the indictment on grounds that his constitutional rights were allegedly violated by the delay from offense to arrest, the events leading to trial are listed chronologically as follows:¹

¹ The transcripts for this case will be referred to as follows:

"C. Tr."—Hearing before the Commissioner, November 26, 1963;

"M. Tr. I"—Hearing on motion to dismiss, February 14, 1964;

1. September 29, 1962 (*Offense*)

Shortly after midnight, police undercover officer Rufus Moore saw appellant sell narcotics to a police informer, Atria Harris (C. Tr. 3-4, T. Tr. 46). The illicit purchase was made on a well-lighted street (T. Tr. 54). Officer Moore had not known appellant before but had heard he was selling narcotics in that area (C. Tr. 12, T. Tr. 50). On the other hand, Harris had known appellant for six to eight years before the incident and had conversed with him "quite a few times" (T. Tr. 31-32). Both Moore and Harris identified appellant after he was arrested (T. Tr. 51) and at trial (T. Tr. 17, 48).

2. March 15, 1963 (*Warrant Obtained*)

Approximately five and one-half months later, Officer Moore ceased his undercover work and obtained warrants for the arrest of 102 individuals, including appellant.

3. October 28, 1963 (*Arrest*)

In the weeks that followed, most of the arrest warrants were executed;² appellant, however, was not arrested until October 28, 1963—almost seven and one-half months after the warrants were issued. At two pre-trial hearings on motions to dismiss (See Nos. 6 and 9, *infra*), police testified that they searched continuously for appellant from March through October 1963 (M. Tr. I 12, M. Tr. II

"M. Tr. II"—Hearing on motion to dismiss, June 24, 25, 1965;
and

"T. Tr."—Trial, June 28, 1965.

Unless otherwise noted, all remaining information in this counterstatement is taken from the docket entries of Cr. No. 1214-63.

² Appellee asks the Court to take judicial notice of the record before it in the pending case of *Jackson v. United States*, No. 19224, which arises from the same undercover activities involved here. In a hearing held on February 8 and 9, 1965, on a motion to dismiss that indictment, Officer Moore testified that after April 1963 all but six warrants (out of the original 102) had been executed, at which time the Narcotics Squad began a concerted effort to find the remaining offenders (M. Tr. 65, 82).

57). They attempted to serve the warrant during "every tour of duty" by maintaining surveillance over appellant's cars and an address believed to be his (M. Tr. I 13, M. Tr. II 57-58, 64). Police officers would usually watch the house for "an hour, sometimes two" at different times of the day and night (M. Tr. II 58, 62-63). Police were simultaneously covering the entire city to execute the other 101 warrants obtained by Officer Moore (M. Tr. I 13, M. Tr. II 57).

Police learned that appellant "was traveling back and forth to New York City and was sneaking back into the District of Columbia at late and unusual hours" (M. Tr. I 13, M. Tr. II 66). They had reason to believe that appellant was absent from the jurisdiction for "weeks at a time" (M. Tr. II 66). On one occasion, the police went to the door of the suspected address but were met with open hostility. A woman and a man (not appellant) denied that appellant was there and told police to get a search warrant (M. Tr. II 61). Obtaining such a warrant was impossible, however, because police had no legal basis for ascertaining appellant's presence on the premises (M. Tr. I 14-16, M. Tr. II 62). On October 28, 1963, police apprehended appellant as he walked out of the Municipal Building in the 600 block of C Street (M. Tr. II 56).

Appellant and several witnesses attempted to show that he was available for arrest during this period. Appellant said that he lived with his aunt at the same address which police had under surveillance (M. Tr. II 20). He admitted being out of town ("but just overnight") and taking one or two trips to New York during that period (M. Tr. II 20, 28); however, his aunt later testified that she never knew he left the city (M. Tr. II 51). Appellant stated that he made weekly car and insurance payments, that he had a bank account, that he obtained a driver's license, and that he made regular trips to the laundry and barber shop during this period when the police could not find him (M. Tr. II 20-24). He said he knew nothing about a warrant until his arrest (M. Tr. II 21-22).

An officer of the finance company testified that appellant's records indicated weekly car payments, but he could not personally recall ever having seen appellant during that time (M. Tr. II 35). Appellant's barber said that he saw appellant three or four times a week (M. Tr. II 44), and his aunt testified that he lived with her during the period in question (M. Tr. II 50-51).

4. November 26, 1963 (*Commissioner's Hearing*)

Officer Moore was the only witness at this hearing, after which appellant was released on bond.

5. December 23, 1963

On this date the grand jury returned its indictment. Appellant was arraigned eleven days later, on January 3, 1964, at which time he entered a plea of not guilty. He remained on bond after his arraignment.

6. February 14, 1964 (*Hearing on Motion to Dismiss*)

Appellant moved to dismiss on grounds that he was denied a speedy trial guaranteed by the Sixth Amendment. Detective Bertram Fogle of the Metropolitan Police, testified that police tried diligently to execute the warrant for appellant's arrest (See No. 3, *supra*). The motion was denied (M. Tr. I 17).

7. February 14 to September 15, 1964

Trial was set six times (February 25, March 25, May 4, June 1, July 14 and September 15) and, except for one continuance when a police witness was ill (given with appellant's approval), all continuances were requested by defense counsel who was simultaneously engaged in civil trials. Appellant remained free on bond during this period.

8. September 15, 1964 (*Appellant jumps bond*)

Appellant failed to appear in court for trial on the scheduled date, and his bond was forfeited. He remained

at large for more than seven months and was not returned to custody until April 27, 1965.

9. *June 24, 25, 1965 (Second Hearing on Motion to Dismiss)*

Appellant again moved to dismiss the indictment, this time on grounds that the delay between offense and arrest violated his Fifth Amendment rights of due process, as well as his Sixth Amendment rights to a speedy trial (M. Tr. II 7). Appellant and his witnesses were heard, Detective Fogle testified again, and the motion was denied (M. Tr. II [vol. II] 13) (See No. 3, *supra*).

10. *June 28, 1965 (Trial)*

The motion to dismiss was renewed and denied (T. Tr. 5-6). Officer Moore and Atria Harris testified for the government (Tr. Tr. 14-42, 43-63), and stipulations were entered regarding evidence and testimony about the narcotics purchased from appellant (Tr. Tr. 64). Appellant made a motion for judgment of acquittal, which was denied, and appellant then rested (T. Tr. 65).

SUMMARY OF ARGUMENT

Appellant has failed to carry the burden of showing that the delay between his offense and arrest was unnecessary or unreasonable. The 5½ month delay from offense to issuance of an arrest warrant, although intentional, was legitimate for protecting the identity of the police undercover agent. Other cases arising from the same undercover investigation have held similar and longer delays to be reasonable. The delay from the warrant date to the actual arrest was not intentional, because the record shows great diligence on the part of police to apprehend appellant.

While it is unnecessary to consider prejudice to a defendant where the delay has been reasonable and necessary, nevertheless none was evident here. Appellant failed to assert a plausible claim of inability to recall or reconstruct the events of the day of the offense, even though

his circumstances reflect sufficient touchstones for such a claim to be made. The Government case was without the "slender dimensions" of *Ross v. United States*, in that there were two witnesses to the crime, not just one. Moreover, there was no danger of mistaken identity because one of the witnesses was a long-time acquaintance of appellant.

ARGUMENT

The delay between offense and arrest was reasonable.

(M. Tr. I 13-16; M. Tr. II 20-24, 26, 43, 50, 57-58, 61-64, 66; T. Tr. 17, 31-32, 51)

Despite two pre-trial hearings in which the court held to the contrary, appellant claims a denial of due process because police allegedly took too long before arresting him.² Appellant was convicted for selling narcotics to a police informer. The sale took place in the presence of a police undercover agent (Officer Moore), whose identity remained undisclosed for several months following the sale

² Appellant contends that the delay from offense to arrest also constitutes a denial of the speedy trial provision of the Sixth Amendment. This contention is clearly erroneous, because the right attaches only when a charge is pending, not when there is a mere possibility of a criminal charge. See *Nickens v. United States*, 116 U.S. App. D.C. 338, 323 F.2d 808 (1963); *Powell v. United States*, — U.S. App. D.C. —, 352 F.2d 705 (1965); *Hardy v. United States*, 119 U.S. App. D.C. 364, 343 F.2d 233 (1964); *Sanchez v. United States*, 341 F.2d 225 (9th Cir. 1965); *United States v. Simmons*, 338 F.2d 804 (2d Cir. 1964); *Mack v. United States*, 326 F.2d 481 (8th Cir.), cert. denied, 377 U.S. 947 (1964); *Harlow v. United States*, 301 F.2d 361 (5th Cir.), cert. denied, 371 U.S. 814 (1962); *Foley v. United States*, 290 F.2d 562 (8th Cir.), cert. denied, 368 U.S. 888 (1961); *Parker v. United States*, 252 F.2d 680 (6th Cir.), cert. denied, 343 U.S. 935 (1958). It is "conceivable" that the court might look at this pre-arrest period for Sixth Amendment considerations in certain circumstances. *Hardy v. United States*, supra at 365, 343 F.2d at 234. But even if a speedy trial were at issue here, appellant must fail because most of the post-arrest delays were his, including a period of fugitivity after he jumped bail and a series of continuances requested by his counsel while he was on bail. See *Smith v. United States*, 118 U.S. App. D.C. 38, 331 F.2d 784 (1964) (en banc).

so that evidence could be gathered against other narcotics pushers. At the end of this period arrest warrants were obtained for 102 individuals (including appellant), and officers of the Narcotics Squad executed the warrants. Almost seven and one-half months later, appellant was arrested.⁴

The issues involved in an offense-to-arrest delay following an undercover narcotics transaction are well known to this Court.⁵ Before he can invoke the Court's supervisory power to overturn a conviction on the grounds of unfair delay before arrest,⁶ however, appellant has the burden of showing both that the delay was both intentional and unnecessary and that he has suffered prejudice. *Jackson v. United States*, *supra* at 823; *Powell v. United States*, *supra*. Appellant has shown neither.

⁴ The total elapsed time from offense to arrest was well within the three-year statute of limitations (26 U.S.C. § 6531), which normally governs the issue on appeal. *Nickens v. United States*, *supra*; *Powell v. United States*, *supra*.

⁵ See (*John B.*) *Jackson v. United States*, No. 19,224 (pending before the Court); (*Larry*) *Godfrey v. United States*, No. 18,442 (pending); *Garrett v. United States*, No. 19,449 (pending); *Barber v. United States*, No. 19,393, decided December 17, 1965; *Glover v. United States*, No. 19,498, decided December 7, 1965; (*Lawrence*) *Godfrey v. United States*, No. 19,260, decided November 5, 1965; *Anderson v. United States*, No. 19,174, decided October 28, 1965; *Worthy v. United States*, — U.S. App. D.C. —, 352 F.2d 718 (1965); (*Francis*) *Jackson v. United States*, — U.S. App. D.C. —, 351 F.2d 821 (1965); *Roy v. United States*, No. 18,285, decided September 2, 1965; *Powell v. United States*, *supra*; *Bey v. United States*, — U.S. App. D.C. —, 350 F.2d 467 (1965); *Canady v. United States*, — U.S. App. D.C. —, 351 F.2d 817 (1965); *Mackey v. United States*, — U.S. App. D.C. —, 351 F.2d 794 (1965); *Ross v. United States*, — U.S. App. D.C. —, 349 F.2d 210 (1965); *Hardy v. United States*, *supra*; *Wilson v. United States*, 118 U.S. App. D.C. 319, 335 F.2d 982 (1963); *Redfield v. United States*, 117 U.S. App. D.C. 231, 328 F.2d 532, *cert. denied*, 377 U.S. 972 (1964); *Nickens v. United States*, *supra*.

⁶ *Ross v. United States*, *supra*, is the only case in which the Court has used its supervisory powers to reverse on the grounds of pre-arrest delay; however, it did not "define the precise reach of the Fifth Amendment in this context."

First, on the question of whether delay was necessary and reasonable, it is advisable to consider separately the intentional delay of five and one-half months from the offense to the issuance of the arrest warrant and the non-intentional delay of seven and one-half months from the date of the warrant to the actual arrest.

The first delay by police was necessary to protect the identity of its effective undercover man. Such a delay, if reasonable, is legitimate for controlling illegal narcotics activity. *Powell v. United States, supra*. This Court has found reasonable a delay in another case where the same Officer Moore observed a narcotics sale to the same informer during the same undercover period but where the sale was made one month earlier (or six and one-half months before Officer Moore obtained the warrants), *Hardy v. United States, supra*; where the sale in the presence of Officer Moore took place less than two weeks later (October 10-11, 1962), *Powell v. United States, supra*; and where the sale was made a week after that (October 19, 1962), *Jackson v. United States, supra*. Clearly this first period from offense to warrant was both reasonable and necessary, albeit intentional.⁷

The second delay (from the warrant date to arrest) was anything but intentional because police "used 'every means available to them' as they diligently . . . sought to arrest appellant." *Roy v. United States*, No. 18,285, decided September 2, 1965, slip op. at 3. Day and night surveillance was placed over appellant's residence and autos (M. Tr. I 13, M. Tr. II 57-58, 62-64). Officers attempted to serve the warrant "every tour of duty," and they usually watched the house for "an hour, sometimes two" (M. Tr. I 13, M. Tr. II 57-58, 64).

That more time could not be devoted to appellant's arrest is understandable in view of the 101 other war-

⁷ Other courts have found eleven months from offense to warrant to be "reasonable" in a narcotics undercover situation. *United States v. Simmons, supra*. In that case, arrest was not made for another 14 months, so the elapsed time from offense to arrest was 25 months (almost double the time in this case).

rants that had to be executed in other parts of the city (M. Tr. I 13, M. Tr. II 57). Failure to find appellant would be explained if, as police had reason to believe, he "was traveling . . . to New York City and sneaking back into the District at late and unusual hours," as well as absenting himself from the jurisdiction for "weeks at a time" (M. Tr. I 13, M. Tr. II 66). These are hardly the actions of one who insists he knew nothing about an arrest warrant (M. Tr. II 21-22).⁸ Appellant even admitted taking trips to New York during this period (M. Tr. II 20, 28). Police had no legal basis for obtaining a warrant to search the house where appellant was allegedly living with his aunt, because there was no available information reflecting his probable presence in the house (M. Tr. I 14-16, M. Tr. II 62). And they were rebuffed when they attempted to determine appellant's presence (M. Tr. II 61). Under these facts, the delayed arrest was neither intentional nor unnecessary.⁹

This Court need not even inquire into the issue of prejudice if the delay is found to be necessary and reasonable. See *Powell v. United States*, *supra*. But assuming *arguendo* that this pre-arrest delay was too long, appellant nevertheless fails to show prejudice beyond his bald assertion that he does not remember. He has not established "a plausible claim of inability to recall or reconstruct the events of the day of the offense." *Ross v. United States*, *supra* at 215; see *Jackson v. United States*, *supra* at 823. Because he lived with his aunt during this period (M. Tr. II 20, 50), was regularly employed (M. Tr. II 26), was making regular installment payments on his car and insurance (M. Tr. II 22-23), was seeing his

⁸ See *Nickens v. United States*, *supra* at 340, 323 F.2d at 810 ("a fugitive or one who had concealed his wrongdoing could obviously not claim he was oppressed by delay").

⁹ Even if police had been more diligent (although it is difficult to conceive what more they could have done under these circumstances), their actions did not constitute deliberate delay without due consideration for the defendant's right to be advised of the charges against him. Compare *Ross v. United States*, *supra* at 212, 213, 215-216.

barber "every other day" (M. Tr. II 24, 43), and had a regular girl friend (M. Tr. II 53), it would appear that appellant could have made some "plausible claim," if in fact he had one.¹⁰

Balanced against appellant's failure to show prejudice was a strong Government case without the "slender dimensions" of *Ross v. United States, supra*. Two witnesses instead of one testified to the narcotics transaction.¹¹ There was no possibility of mistaken identity because one of the witnesses had known and talked with appellant "quite often" during the six to eight years before the incident (T. Tr. 31-32). Both witnesses identified appellant as the offender shortly after his arrest (T. Tr. 51) and at trial (T. Tr. 17, 48).¹² Appellant obviously was not prejudiced.

¹⁰ With further delays from indictment to trial (approximately one and one-half years), occasioned by a busy defense counsel who kept requesting continuances and a 7½ month period of fugitivity after appellant jumped bail, it is doubtful that any memory failure by witnesses could be attributed to the pre-arrest delay in any event.

¹¹ The same two witnesses testified in *Hardy v. United States, supra*, a factor which the Court regarded as highly significant in differentiating between its affirmance in *Hardy* and its reversal in *Ross*, a one-witness case. See *Ross v. United States, supra* at 215 n.4. This Court has affirmed a conviction in a case in which only Officer Moore testified at trial. *Jackson v. United States, supra* (offense-arrest delay of almost 5½ months). See also *Cannady v. United States, supra*; *Bey v. United States, supra*; *Wilson v. United States, supra*; *Morgan v. United States*, 115 U.S. App. D.C. 310, 319 F.2d 711 (1963).

¹² Appellant points out minor discrepancies in the police officer's testimony at the hearing before the Commissioner and at trial (Br. 34). This is completely understandable in view of the one and one-half year interval caused by the delays mentioned in note 10, *supra*. However, Officer Moore's testimony was consistent and certain in all material aspects (Tr. 43-63).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 19,739

Wilburt King, Appellant

v.

United States of America, Appellee

Appeal from judgment of the United States
District Court for the District of Columbia

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February 14, 1966

United States Court of Appeals
for the District of Columbia Circuit

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19, 739

WILBURT KING, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from judgment of the United States District Court for
the District of Columbia

REPLY BRIEF FOR APPELLANT

Reply to Appellee's Counterstatement of Case

1. The amount of narcotics involved in the alleged sale was one \$12.50 glassine bag. (Trial Transcript, page 19.)
2. The violation was alleged to have occurred in the presence of Officer Rufus Moore, the undercover narcotic agent, and one Atria Harris, an addict informer. (Trial Transcript, pages 45 and 46.) No arrest took place at the time of the alleged sale. (Trial Transcript, page 54.)

3. Officer Moore testified at the trial that he did not know the appellant, that he had never seen him prior to the date of the alleged offense and that he was not introduced to him at that time. (Trial Transcript, page 50.) Nor did he see him again until he was arrested. (Trial Transcript, page 54.)

4. Atria Harris, the addict informer special employee of the narcotics squad, who had been convicted of violation of the narcotic laws and larceny (Trial Transcript, page 41) and who was being paid with money given him by Officer Moore and Officer Fogel for his informing work (Trial Transcript, page 23) was the only witness offered by the Government at the trial other than officer Moore.

5. Together Officer Moore and Atria Harris, subsequent to the date of the alleged offense, identified the appellant from a picture in the Metropolitan Police Department file (Trial Transcript, page 51).

6. Appellant was unable to produce a single witnesses to testify in his behalf. His sole defense was his plea of "not guilty". He did not take the stand; had he done so it would have been his word against that of a police officer's.

In fact, in order to prevent an overpowering array of government witnesses the defense entered into a stipulation with the prosecution that whatever Officer Moore turned over to Officer Fogel who later turned same over to the government chemist was narcotics. (Trial Transcript, page 63 and 64.)

7. On the hearings on the Motions to Dismiss Officer Fogel of the narcotic squad testified that he had no warrant with him when appellant was arrested; (Transcript of Motion to Dismiss dated June 24-25, 1965, page 57); that he had kept no record or log of his claimed attempts to serve the arrest warrant (Ibid, page 57) except from his "memory"; that he went to appellant's house at 1407 A Street, S.E. on numerous occasions, even "placed it under surveillance" but never entered the house with the arrest warrant nor got a search warrant to enter the house (Ibid, page 58 and 61) despite the claim that the appellant was dealing in narcotics; that when asked by the Court exactly how many times he tried to serve the warrant "Ten, twenty, thirty" his answer lacked specificity (Ibid, page 64); that actually his testimony was conflicting respecting whether he ever even went to the door of 1407 A Street S.E. in an attempt to serve the arrest warrant (Transcript Motion to Dismiss, dated February 14, 1964, page 15: "Q. How many times did you go knock on the door, sir at 1407? A. We never went and knocked on the door...".)

Reply to Appellee's Argument

1. Appellee claims that the appellant has not carried the burden of proving that the delay in this case between offense and arrest was unnecessary and unreasonable. Yet, it is admitted that the 5 1/2 month delay between offense and issuance of the warrant was "intentional" albeit "legitimate" because necessary to protect the identity of undercover narcotic agents.

With all due respect for the past rulings of this Honorable Court insofar as the legitimacy of the activities of the undercover agents for the narcotic squad are concerned, the instant case is not one wherein delay was essential on the part of the police in order that further investigation was needed in the matter to complete the government's case.

The government has claimed this sale occurred in the very presence of the narcotic agent. Probable cause for arrest existed at the instant an exchange of money for narcotics was allegedly made. In not making an on-the-spot arrest the narcotic agent, although possibly acting on the orders of his superiors, failed in his duty to apprehend suspected law offenders. What is more he violated the specific precepts of the narcotic statute in not making such arrest. Draper v. U.S., 358 U.S. 307, 310;

James E. Ford, No. 17835 and George Kimble, No. 17835, decided August 24, 1965, and U.S. v. Walker, 256 F.2d 519, 524-525 (7th Cir 1957). By purposefully creating delay by not making the arrest the narcotic agent chances, not his own, but society's stake which could be completely lost as the offender might never be apprehended. Nothing appears clearer in the intent and purpose of the narcotics statutes viewed as a whole than that narcotic violators, particularly those selling narcotics, are to be gotten off the streets immediately! It is one thing for the government to delay arrest for investigative purposes in order to complete its case, and quite another when the government deliberately delays making an arrest for 5 1/2 months when its alleged case is absolutely complete. To now say that this appellant must shoulder the burden here so lightly tossed aside by the government in the first instance chips away at both the presumption of innocence of one accused of committing an offense and Constitutional guaranties of the Fifth Amendment. Escobedo v. U.S., 378 U.S. 478 (1964); Ross v. United States, ____ U.S.App.D.C. ____, 349 F.2d 210 (1965); Hanrahan et al v. U.S., Nos. 18,038, 18,040 and 18,041 decided June 24, 1965.

2. Appellee contends the record shows the narcotic squad used "great diligence" in attempting to serve the arrest warrant ^{on} it finally issued. However, the narcotics squad could produce no log or record of its attempts to serve the arrest warrant (Transcript of Motion to Dismiss, dated June 24 and 25, 1965, pages 57 and 58). The "bald assertion" of Officer Fogel that diligent efforts were made of attempts to serve the warrant and that the only record of such attempts was from his "memory" (Ibid, page 57) are self-serving statements which in and of themselves prove nothing. Henry W. Jackson, No. 19134, decided November 4, 1965. Having purposefully created a delay in the first instance by not making an immediate arrest, the burden rested with the narcotic squad and the government to prove diligence in attempts to serve the warrant once issued. That burden simply has not been met in this case. See the opinion of Judge Greene in this respect in United States of America v. James J. Pettis, Criminal Action No. US 9047-51-65, District of Columbia Court of General Sessions, Criminal Division.^{1/}

3. Finally, it is appellee's argument that the appellant makes no "plausible claim" that he has been prejudiced by the delay

^{1/} For the convenience of the Court this opinion appears as an appendix to the Reply Brief.

of over twelve months which occurred in this case. In Cannady v. U.S., No. 18,392, decided July 14, 1965, this Court recognized that delay between offense and arrest may so blur the memory of the accused that "where he is innocent he might be unable to recall the facts which would comprise his alibi or other defense." In other words delay in and of itself may be deemed prejudicial. True, counsel did not call the defendant to the stand and ask him point blank if and how he claimed prejudice. Nor was it necessary to do so. As the Court stated in Mackey v. U.S., No. 18,525, decided August 30, 1965, prejudice does not have to be proved beyond a reasonable doubt or even by a preponderance of the evidence. What is more defendant does not have to take the stand to show he had been prejudiced as this burden can be met by many ways short of requiring the accused to go forward on the issue. Three times the appellant moved to dismiss the indictment; twice in motions heard by the Court and once in the trial itself. In the Motion to Dismiss Indictment filed February 5, 1964, paragraph 4 states: "The defendant was prejudiced in that the fact of an alleged offense by him was not brought to his attention until thirteen (13) months after the date that it took place. At that late date it was impossible for him to remember or recall where he was or what he was doing at the time of the alleged crime. Thus the defendant cannot call witnesses at the trial herein who could establish his innocence of the offense. (J.A.-11(b).)

And again the Motion to Dismiss Indictment filed June 24, 1965, it is stated: "The delay in failing to serve the defendant with the arrest warrant issued in his name on March 15, 1963, was prejudicial in that due to the lengthy passage of time, the memory of the defendant has paled with respect to his whereabouts on the evening of September 29, 1962, the date of the alleged offense, or of his companions of that evening, and likewise has grown dim the memory of other persons who might have come to assist him in recalling the events of the particular time in question." (J.A.-7(b).) Here separate counsel in two different motions is attempting to tell the trial court that it simply is not possible to prepare any kind of defense in this case because so much time has lapsed between alleged offense and ultimate arrest. The trial itself would seem to be proof of this fact. Appellant did not have a single witness to call in his behalf. While he might have testified in his own behalf, it goes without saying that unsupported his testimony would have meant very little in the face of police testimony. Yet, the government says that the defendant makes no "plausible claim" of prejudice here.

Appellant respectfully submits that not only is his claim of prejudice "plausible" it is justifiable. There is no denial that the lapse of time created an air-tight case for the government; however, to label the case a "strong Government case" is a complete misnomer. Under the circumstances present it is about as weak a case as could be put to trial.

Conclusion

Wherefore, it is respectfully submitted that the judgment of the District Court be reversed.

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Mary M. Burnett
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Washington, D.C.

Counsel for Appellant

DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS
CRIMINAL DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAMES J. PETTIS
6533 3rd Street, N. W.
Washington, D. C.

Defendant.

CRIMINAL ACTION NO. US 9047-51-65

OPINION

This is a motion to dismiss the informations for failure to prosecute without undue delay. The offenses^{1/} were alleged to have been committed on August 23, 1964; a warrant for defendant's arrest was issued on October 6, 1964; but that warrant was not executed until October 9, 1965 -- over 13 months after the events giving rise to its issuance. The defendant claims that this delay is oppressive and jeopardizes his right to a speedy trial.

I

The United States Court of Appeals for this Circuit has spelled out the governing law in a series of recent cases. These decisions may be summarized as follows.

An undue delay between the commission of the offense and the institution of criminal proceedings violates the defendant's rights under the due process clause of the Fifth Amendment. Ross v. United States, ___ U. S. App. D. C. ___, 349 F. 2d 210 (June 30, 1965); Nickens v. United States, 116 U. S. App. D. C. 338, 323 F. 2d 808 (1963), cert. den., 379 U. S. 905; see also, United States v. Parrott, ___ F. Supp. ___ (D. C. December 6, 1965).^{2/} A delay may be "undue" even if the prosecution is brought within the period of limitations (Ross v. United States, supra).

^{1/} Defendant was charged with assault and possession of a prohibited weapon.

^{2/} Such a delay may also violate the speedy trial provisions of the Sixth Amendment. Compare Ross v. United States, supra, with Hamrahan v. United States, ___ U. S. App. D. C. ___, 348 F. 2d 363 (June 24, 1965); and Nickens v. United States, supra (Judge Wright, concurring).

If the interval is substantial, prejudice may be presumed (Williams v. United States, 102 U. S. App. D. C. 51, 250 F. 2d 19 (1957)); if it is relatively brief, the defendant must show that he is actually prejudiced in the presentation of his defense by virtue of the delay. Jackson v. United States, ___ U. S. App. D. C. ___, 351 F. 2d 821 (September 13, 1965); Worthy v. United States, ___ U. S. App. D. C. ___, ___ F. 2d ___ (October 7, 1965).^{3/}

The accused need not prove prejudice beyond a reasonable doubt or by a preponderance of the evidence; it is enough if he makes a "plausible claim" of inability to recall or reconstruct the events of the day of the offense. This burden may be met either by the testimony of others (Jackson v. United States, supra (majority opinion)) or by defendant's own testimony given to the court out of the presence of the jury (Jackson v. United States, supra (Judge Danaher, concurring)).^{h/}

The reasons for the delay must be taken into account and evaluated in relation to the interest asserted by the accused (Hanrahan v. United States, ___ U. S. App. D. C. ___, 348 F. 2d 363 (June 24, 1965); Ross v. United States, supra); so presumably must the gravity of the offense.

While claims of undue delay have most often been credited in narcotics cases, neither precedent nor logic limits the rule to that class. The risk of an erroneous conviction after long delay is compounded when the government's case rests — as is true in many narcotics cases — on the uncorroborated testimony of an agent who is not testifying from personal recollection but only from notes (Cannady v. United States, ___ U. S. App. D. C. ___, 351 F. 2d 817 (July 14, 1965)). But if the delay is unjustified and the circumstances are such that there is a substantial risk of a false conviction,

^{3/} In Ross, a seven-month delay was held to be too long under the circumstances. In Mackey v. United States, ___ U. S. App. D. C. ___, 351 F. 2d 794 (August 30, 1965), Judge Washington implied in his concurrence that even a two-month delay may cause a dismissal if prejudice is shown. Compare United States v. Fay, 313 F. 2d 620 (C.A. 2, 1963).

^{h/} This course, as Judge Danaher points out in Jackson, protects the defendant's rights in regard to self incrimination (because presumably the testimony adduced during the hearing on the motion may not be used at the trial).

the indictment or information may not stand whatever the underlying charge (cf. Hanrahan v. United States, supra; Taylor v. United States, 99 U. S. App. D. C. 185, 238 F. 2d 259 (1956); see also the thoughtful and comprehensive opinion Judge Casch handed down this month in Parrott, supra).

This brief outline of governing law suggests that the informations here must be dismissed if (1) defendant is prejudiced with respect to the presentation of his defense by the passage of time, and (2) there was insufficient reason for the delay in prosecution.^{5/}

II

First, as to the issue of prejudice. Defendant testified at the hearing on the motion that he has never seen, met, or assaulted the complaining witnesses; that he would be unable at this juncture to produce alibi witnesses testifying to his whereabouts at the time of the alleged offenses; and that he is unable now to give an hour-by-hour or day-by-day account of his life in August 1964 so as to exculpate himself of the charges. The government was unable, by way of cross examination or otherwise, to discredit this testimony.

The prosecution suggests that since defendant was able to remember his old address and similar data his claim of loss of memory concerning the events in question must be feigned. But the accused never asserted that he was a victim of amnesia, but only that he is unable, fourteen months after the event, to reconstruct specific days in his life so as to be able to offer a defense to the charges. It is further argued that surely the accused must be able to recall an event as startling as an assault. But this presupposes that an assault took place -- something the accused strenuously denies. The prosecution made no effort at the hearing on the motion to confront the defendant with the victims of the alleged assaults. It may well be that such a confrontation would have disposed of the claim that the defendant had never met these persons, and it might have served, inferentially, to refresh defendant's recollection, if, in fact, the prosecution's version is true.^{6/}

^{5/} See Powell v. United States, ___ U. S. App. D. C. ___, ___ F. 2d ___ (August 30, 1965).

^{6/} Compare Bay v. United States, ___ U. S. App. D. C. ___, 350 F. 2d 667 (July 20, 1965).

But no confrontation was attempted and defendant's story was unshaken in all respects.

It is not insignificant in this connection that the identification of this defendant as the perpetrator of the offenses is dubious at best. According to the officer's affidavit in support of the arrest warrant, the two complaining witnesses stated to him that defendant pointed a revolver at each of them in succession, pulling the trigger several times, but that no one was injured because the weapon failed to fire each time. One of the complaining witnesses allegedly knew defendant from a construction job but was unable to supply defendant's name until later -- how much later is unclear. On the stand the officer said that identification was not made until October 6, 1964 -- some six weeks after the alleged assaults. In his affidavit in support of the warrant he stated that the identification was made "several days" after the alleged offenses.

In short, in some respects, this case is not unlike the narcotics cases which have so troubled the appellate court. Guilt or innocence here depends on the word of a single person. That person has had considerable difficulty making an identification of defendant, for, if the officer's story on the stand is true, it took the complaining witness six weeks to identify defendant, allegedly a co-worker, as his assailant. Indeed, it finally became necessary to show the complaining witness a photograph of defendant -- a man whom presumably he knew well -- before he decided that this defendant was his assailant. There is no evidence that the other victim of the alleged assault ever made an identification. Finally, as indicated, neither complainant was produced at the hearing on the motion where their bizarre story might have been somewhat substantiated by a confrontation. Cf. Taylor v. United States, 99 U. S. App. D. C. 183, 238 F. 2d 259 (1956).

In the absence of any evidence contradictory of defendant's emphatic testimony, the Court finds that a "plausible claim" of prejudice has been made out (cf. Jackson v. United States, supra).

III

The second question is whether there was reasonable cause for the delay. Defendant contends that the delay here is per se unreasonable and that no inquiry need be made into the reasons why the warrant was not served sooner. To be sure, language in some of the opinions suggests that where the delay is substantial the court should go no further and dismiss on that account alone (see Jackson v. United States, supra; United States v. Parrott, supra). But since in all of the cases consideration was given to the reasons for the delay, any discussion of dismissals on account of delay alone would have been only dictum. Without specific appellate direction, this Court is unwilling to hold that delay alone (short of the period of limitations) will be grounds for dismissal. The degree and likelihood of prejudice to the defendant, on the one hand, and the adequacy of the explanation for the delay, on the other, are parts of the same equation, and no sound judgment can be rendered without consideration of both factors. Cf. Beavers v. Hubert, 198 U. S. 77 (1905), 25 Sup. Ct. 573; Taylor v. United States, supra.

What, then, were the reasons for the delay here? The offenses were alleged to have been committed on August 23, 1964. The police were notified on the same date. Some time between that date and October 6, 1964, one of the complaining witnesses identified this defendant as the suspect and a warrant was issued for his arrest.

The officer charged with the duty of serving the warrant testified that he knew the accused and had his address. He went once to the premises in question but found no one home, and he made three telephone calls but never reached anyone. This constituted the totality of the efforts to serve the warrant on defendant or to bring him to trial.^{7/} All such efforts ceased

^{7/} The officer testified that another officer may have made one other attempt to reach defendant, but he was not certain about this. The other officer was never identified or produced.

in December 1964, except that a "stop order" was issued, that is, Criminal and Traffic Records Departments were notified of the unserved warrant.

In March 1965, while the instant warrant was outstanding, defendant was arrested on a disorderly conduct charge, and released upon forfeiture of collateral. No check of the records was made at that time and the warrant was not served. It was finally served on October 9, 1965,^{8/} and the machinery was then set in motion to bring defendant to trial.

According to the defendant, he did live at the address which the officer checked in December 1964, and had lived there since February 1964. The address is a rooming house. He had a good relationship with the rooming house operator and she would have known where to find him at all times. There was a telephone in the rooming house in the operator's name. Except for one year's absence, defendant has lived in the District of Columbia all his life; he has many friends who know his whereabouts. Among his friends are two police officers who would know where to find him. Many of the merchants near his home know him and would also know where to locate him. He has been working as a tile setter in the area and could be located at any time on the job through his employers.

In light of this evidence, the Court finds that the police failed to proceed with reasonable dispatch. This conclusion is based upon three interrelated factors:^{9/} (1) the inadequate efforts made to locate defendant shortly after the alleged identification; (2) the failure to initiate proceedings against defendant at the time of the disorderly conduct charge; and (3) the total inaction of the police with respect to this case since December 1964.

IV

The interest of society in the protection of the rights of those accused of crime frequently clashes with society's interest in effective law

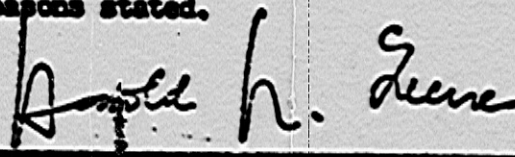
^{8/} At that time the defendant was arrested on an unrelated charge.

^{9/} It is therefore unnecessary to decide whether one of these factors standing alone could be said to have been "inaction amounting to negligence," in Judge Gasch's phrase (United States v. Parrott, supra, slip opinion at p. 12).

enforcement. That clash, however, is minimal here because both objectives are furthered by the rule requiring speedy prosecutions. One of the most potent deterrents to crime is the probability of swift apprehension, prosecution, and punishment. All too often this ideal is unattainable because of the delays inherent in our legal system. But prosecution should certainly never be delayed unnecessarily. Avoidable delays cannot be condoned (whether they be attributable to design or to simple negligence),^{10/} if only because such delays will unnecessarily add to the impression that prosecution and punishment are conjectural and remote. Moreover, long delays blur the memories of prosecution and defense witnesses alike. In short, the rules requiring quick prosecution are in the long-range interest of the prosecutor as well as of the accused.

The United States Attorney's Office has publicly announced a campaign of review of old warrants, designed to eliminate some outdated charges and present others to the court. This initiative is to be highly commended. Periodic review of outstanding warrants will go far toward avoiding the necessity for dismissals on speedy trial grounds. Yet there must be no misunderstanding about the duty of the court when old cases are presented for trial. If there is a legitimate law enforcement reason for the delay -- if, for example, the alleged culprit has been out of the city or if, despite substantial effort, the police were unable to locate him -- the charges may be fully prosecuted to their conclusion. But if, on the other hand, the charges have become stale simply because they were left to rest in an old file drawer to be brought to light only by some fortuitous circumstance, the court will have no alternative but to dismiss.

The informations are dismissed for the reasons stated.


JUDGE

Dated this 27th day of December, 1965.

^{10/} See Hanrahan v. United States, ___ U. S. App. D. C. ___, 348 F. 2d at 368 (1965); United States v. Parrott, supra (slip opinion, p. 20).

PETITION FOR REHEARING EN BANC
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19739
No. 20138

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 15 1966

Nathan J. Paulson
CLERK

WILBURT KING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Appeal from the United States District Court
for the District of Columbia

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19739
No. 20138

WILBURT KING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING *EN BANC*

Petitioner, Wilburt King, through counsel, hereby petitions this Honorable Court for a rehearing *en banc* and in support of this petition respectfully alleges as follows:

1. Petitioner appealed from conviction of narcotics offenses involving an alleged single sale of one \$12.50 bag of narcotics, the sale allegedly made on September 29, 1962, to a police informer addict in the presence of an undercover narcotic policeman.¹ Despite the fact

¹ Identification of the alleged seller to the narcotic agent was on hearsay evidence of the addict-informer and the informer knew that he and the defendant had been in Lorton Reformatory at the same time. Preliminary Hearing Transcript, Page 4; Tr. Vol. II, June 25, 1965, Page 7; Tr. Vol. 1, June 28, 1965, Pages 6, 7, 38, and 50.

that at the moment of the alleged exchange of narcotics and money the government's case was complete, no arrest was made.²

2. On March 15, 1963, five and one half months subsequent to the alleged sale, a complaint was filed and an arrest warrant issued against petitioner. Although petitioner avowed availability in the jurisdiction for service of the arrest warrant, it was not until seven months later, on October 28, 1963, that he was apprehended in broad daylight coming out of the Municipal Center, on "C" Street, N. W., Washington, D. C., and taken to the narcotics bureau in the Center where he was told that there was a warrant for his arrest.³

3. On February 14, 1964, the trial court heard petitioner's Motion to Dismiss predicated on grounds that he was denied a speedy trial as guaranteed by the Sixth Amendment to the Constitution of the United States. At that hearing petitioner was precluded by the court from an attempt to rebut testimony of the police that diligence was exerted during the seven months following issuance of the arrest warrant to execute it forthwith, and the Court ruled that as a matter of law, delay in making an arrest subsequent to the filing of a complaint is not grounds for dismissal of an indictment.⁴

4. At a second hearing on the Motion to Dismiss petitioner testified as to his availability in this jurisdiction for service of the forthwith arrest

² Title 26 U.S. Code Section 7607(2).

³ Tr. Vol. 1, February 14, 1964, Page 15; Tr. Vol. 1, June 24, 1965, Pages 22-24. See also plaintiff's Exhibits 1 and 2; Tr. Vol. 1, February 14, 1964, Page 3; Tr. Vol. 1, June 25, 1965, Pages 19-24 and 56-57.

⁴ It was subsequent to this hearing that the petitioner jumped bond. (Petitioner makes no claim whatsoever respecting denial of Fifth and Sixth Amendment guarantees for any time lapse between indictment on December 23, 1963, and his trial on June 28, 1965.)

warrant, and other testimony was presented to the Court on this issue. The entire tenor of the hearing was directed at a showing of the prejudicial effects of the seven months delay in execution of the arrest warrant — particularly prejudicial when the lapse of this extended period of time was coupled with the intentional delay of five and a half months in filing the complaint and issuance of the warrant, thus causing an overall delay of about thirteen months. *Woody v. United States*, No. 17965, Apr. 12, 1966, _____ U.S. App. D.C. _____, _____ F.2d _____; *Godfrey v. United States*, _____ U.S. App. D.C. _____, 358 F.2d 850 (1965); *Jackson v. United States*, 122 U.S. App. D.C. 124, 351 F.2d 821 (1965); *Ross v. United States*, 121 U.S. App. D.C. 233, 349 F.2d 210 (1965). The Court again denied the motion without making findings of fact or conclusions of law.

5. Once again, following trial, petitioner moved for an acquittal or new trial, offering additional evidence to substantiate the issue of the availability of the defendant in this jurisdiction for service of the warrant and again claiming that the periods of delay encountered, either separately or in aggregate, were prejudicial to his attempt through counsel to properly defend himself against a charge of which he proclaimed his innocence.

6. Petitioner thereafter sought review of this Court of his conviction on several grounds, the main being that his Fifth and Sixth Amendment rights had been violated because the delays here encountered were prejudicial and resulted to him in a denial of due process of law and his right to a speedy trial. *Hedgpeth v. United States*, _____ U.S. App. D.C. _____, 346 F.2d 684, 687 (1966); *Woody v. United States*, No. 17965, April 12, 1966, _____ U.S. App. D.C. _____, _____ F.2d _____; *Ross v. United States*, 121 U.S. App. D.C. 233, 349 F.2d 210. Additionally, petitioner maintained that when a long delay occurs in service of an arrest warrant that it is incumbent upon the narcotics officers to produce affirmative evidence, for example, a log or record as in kept by the United

States Marshal's Office, of attempts to serve the arrest warrant. Otherwise the unsupported statements of the Narcotics officers to the effect that diligence was exerted in attempting to serve the arrest warrant are completely self-serving,⁵ and the government has failed in carrying forward its burden. See *Henry W. Jackson v. United States*, 122 U.S. App. D.C. 324, 353 F.2d 862 (1965).

7. Petitioner claims (1) that the delays encountered between the time of the alleged commission of the offense, the filing of the complaint and the issuance of the arrest warrant, and his actual apprehension were prejudicial to him in that he was unable to recall the facts surrounding his specific whereabouts, and with whom he might have been with, on the date and the time of the alleged commission of the offense; (2) that as this offense supposedly occurred in the very presence of the narcotic agent that the resulting periods of delay operated to the benefit of the government and to his own detriment and unfair advantage, as an immediate arrest would have obviated prejudice to him and in fact foreclosed the possibility of any chance of resulting prejudicial delays; and (3) that in this particular case the overall thirteen months delay was an extended lapse of time which in and of itself became prejudicial. *Jackson v. United States*, 122 U.S. App. D.C. 124, 351 F.2d 821 (1965); *Ross v. United States*, *supra*.

8. Petitioner believes that his consistent claims of the prejudicial effects of the delays encountered should be ruled upon by the Court both in law and in fact and that as yet no such findings of fact and conclusions of law have been entered by the Court. Further, his position is that the trial court erred in its ruling that as a matter of law, delay in making an arrest subsequent to the filing of a complaint is not grounds for dismissal of an indictment, and finally he claims that as a matter of law where the

⁵ Rule 4(b)(1) and (c)(4). Tr. Vol. 1., Feb. 14, 1964, Page 15; Tr. Vol. 1., June 24, 1965, Page 57 and 61.

narcotics officers cannot produce a log, record, or specific data respecting attempts to serve an arrest warrant and an unreasonable delay results (as the seven month delay here) in an arrest whereafter the defendant avows his availability in the jurisdiction for service of the warrant, and he offers substantial evidence to that end, that the delay encountered becomes prejudicial and the indictment should be dismissed.

WHEREFORE the above premises considered, petitioner respectfully requests that his petition for rehearing *en banc* be granted.

Respectfully submitted,

MARY M. BURNETT

Suite 638, 1001 Connecticut Ave.,
Washington, D. C.

Attorney for the Defendant

November 17, 1966

CERTIFICATE

Mary M. Burnett, counsel for Petitioner, does hereby certify that this Petition for Rehearing is presented in good faith and not for the purposes of delay and respectfully requests oral argument on the petition if the Court will grant the same.

Mary M. Burnett

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Petition for Rehearing have been served personally by leaving a copy at the office of the United States Attorney for the District of Columbia, United States Court House, Washington, D. C., this ____ day of November, 1966.

Mary M. Burnett